Supreme Court, U.S.
FILED

No. 051658

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IN THE

Supreme Court of the United States

EMCARE, INC. and TEXAS EM-I MEDICAL SERVICES, P.A.,

Petitioners,

v.

JUNE BELT, on behalf of herself and others similarly situated; PAUL MAIOCCO, Washington Plaintiff; DONALD CHRISTIAN, New York Plaintiff; LUCILLE MOYLAN, Illinois Plaintiff; VICTOR AMBROSIA, Illinois Plaintiff; DEBORAH NICHOLS, Arizona Plaintiff; and opt-in FLSA EMPLOYEES.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's holding that Nurse Practioners ("NPs") and Physician Assistants ("PAs") are entitled to overtime compensation, notwithstanding that (a) two regulations issued by the Department of Labor ("DOL") provide that employees who hold valid licenses to practice and are practicing in the field of medical science and healing are not entitled to overtime compensation; and (b) NPs and PAs must be licensed in every state and, in accordance with those licenses, conduct physical examinations, diagnose and treat illnesses, order and interpret laboratory tests and x-rays, develop treatment plans, assist in surgery, direct the nursing staff, and prescribe medication—medical functions undisputedly within the traditional field of medical science and healing and traditionally performed only by physicians.

Three questions are presented:

1. When, pursuant to congressional authority, a federal agency issues regulations intended to have the force of law, a court may only give controlling deference to the agency's informal interpretations of those regulations—*e.g.*, interpretations issued in the form of opinion letters or *amicus* briefs—if the court determines that the regulations are ambiguous. May a court give controlling deference to the Department of Labor's informal interpretations of the regulations at issue here without first determining whether those regulations are ambiguous?

2. If a federal regulation's terms are not defined within the regulations and are not intended to be used as terms of art, the ordinary meanings of the terms should be used to determine whether the regulation is ambiguous. If specific terms contained in 29 C.F.R. § 541.3 were not defined in the regulations and do not constitute terms of art, may a court properly determine that

the regulation is ambiguous merely because a state statute addressing a different subject matter defines those terms in a manner inconsistent with the terms' ordinary meanings and with the intent of the federal regulation?

3. Under 29 U.S.C. § 213 (2000) and 29 C.F.R. §§ 541.3, 541.314 (2003), an employee is not entitled to overtime compensation, regardless of whether she is paid on an hourly basis, if she holds a valid license or certificate to practice, and is practicing, medicine or any of its branches. If NPs and PAs hold valid licenses to perform, and are performing, in the same manner as physicians the same medical functions traditionally performed only by physicians, are NPs and PAs entitled to overtime compensation?

LIST OF PARTIES

The Petitioners are EmCare, Inc. and Texas EM-I Medical Services, P.A., and the Respondents are June Belt, on behalf of herself and others similarly situated; including, Paul Maiocco, Washington Plaintiff; Donald Christian, New York Plaintiff; Lucille Moylan, Illinois Plaintiff; Victor Ambrosia, Illinois Plaintiff; Deborah Nichols, Arizona Plaintiff; opt-in FLSA Employees.

CORPORATE DISCLOSURE STATEMENT

1. EmCare, Inc.'s parent company is EmCare Holdings, Inc., and no publicly held corporation owns ten percent (10%) or more of EmCare, Inc.'s stock. EmCare Holdings, Inc.'s parent company is Emergency Medical Services Corporation, and Emergency Medical Services Corporation owns ten percent (10%) or more of EmCare Holdings, Inc.'s stock.

2. Texas EM-I Medical Services, P.A. has no parent company, and no publicly held corporation owns ten percent (10%) or more of Texas EM-I Medical Services, P.A.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	xvi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	12
A. Because the Fifth Circuit gave controlling deference to the Opinion Letter and the *amicus* brief without first determining the ambiguity of both regulations, the Fifth Circuit's opinion conflicts with this Court's precedent	14

Contents

Page

B. Because the proper interpretation of the regulations at issue will have a significant impact on the medical industry in the United States, and because the Fifth Circuit's opinion conflicts with opinions of this Court and the Second, Third, and Ninth Circuit Courts of Appeals, review is warranted 17

1. Review is warranted because the Fifth Circuit's opinion conflicts with the Ninth Circuit's interpretation of the Salary Basis Exception and because the provisions of the relevant regulations will continue to have a significant impact on how employers compensate those who practice in the medical profession 17

2. Review is warranted because the Fifth Circuit is in conflict with this Court and the Second and Third Circuit Courts of Appeals regarding the proper method for determining whether a regulation is ambiguous 19

C. Because of the vital role NPs and PAs have and will continue to play in the practice of medicine, review is warranted to correct the Fifth Circuit's erroneous application of the Salary Basis Exception to NPs and PAs 23

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

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Auer v. Robbins,
519 U.S. 452 (1997) 15, 25

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535 U.S. 212 (2002) 15, 16

Belt v. EmCare, Inc.,
351 F. Supp. 2d 625 (E.D. Tex. 2005) 1

Belt v. EmCare, Inc.,
444 F.3d 403 (5th Cir. 2006) ..... *passim*

Chevron U.S.A., Inc.
v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 14, 15

Christensen v. Harris County,
529 U.S. 576 (2000) 14, 15, 16, 17, 24

Clark v. United Emergency Animal Clinic, Inc.,
390 F.3d 1124 (9th Cir. 2004) ..... *passim*

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 20, 22

Gonzales v. Oregon,
126 S. Ct. 904 (2006) 25

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 25

Cited Authorities

Page

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171 F.3d 818 (3rd Cir. 1999) 20, 22

Moore v. Hannon Foods Serv., Inc.,
317 F.3d 489 (5th Cir. 2003) 24

Preferred Physicians Mut. Risk Retention Group v. Pataki,
85 F.3d 913 (2d Cir. 1996) 20, 22

S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,
126 S. Ct. 1843 (2006) 20, 21, 24, 25

United States v. Mead Corp.,
533 U.S. 218 (2001) 16

FEDERAL STATUTES, REGULATIONS, AND RULES

28 U.S.C. § 1254(1) (2000) 1

28 U.S.C. § 1292(b) (2000) 11

29 U.S.C. § 213 (2000) ..... ii, 1

29 U.S.C. § 213(a) 4, 15

29 C.F.R. § 541.3 (2003) ..... *passim*

29 C.F.R. § 541.3(e) 4, 5, 17, 20, 25

29 C.F.R. § 541.314 (2003) ..... *passim*

29 C.F.R. § 541.314(a) 26

Cited Authorities

Page

29 C.F.R. § 541.314(b) 27

Fed. R. App. P. 5 11

Sup. Ct. R. 10 12

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Cited Authorities

Page

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Page

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(Michie, LEXIS through 2004 Sess.) 7

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(2004) 7

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.0102, .0108, .0109, .0111, .0112
(LEXIS through Apr. 2005) 7, 8

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(LEXIS through 2004 legislation) 8

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(LEXIS through 2005 Reg.) 8

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(LEXIS through 2005 Sess.) 7

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(LEXIS through 2005 Sess.) 8

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(LEXIS through 2004 Regs.) 7

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to 15.3, 15.6 to 15.14, 16.8 to 16.9
(LEXIS through 2004 Regs.) 8

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Page

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(Michie, LEXIS through 2004 Gen. Election) . . . 7

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(Michie, LEXIS through 2004 Gen. Election) . . . 8

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§ 60.8; tit. 10, §§ 94.1 to .2
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(LEXIS through 2005-2 Supp.) 8

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.255, .257, .259, .2595
(LEXIS through 2005-2 Supp.) 7

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.151, .155, .157, .158, .162
(LEXIS through 2005 Supp.) 8

Cited Authorities

Page

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(LEXIS through 2005 Supp.) 7

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-945, -955, -960, -965, -970
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(LEXIS through 2004) 7

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-104, -106, -107, -110, -113
(LEXIS through 2004 Sess.) 8

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-.05, -.10, -.21
(LEXIS through 2005) 8

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(LEXIS through 2005) 7

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(West, LEXIS through 2005) 9

Cited Authorities

Page

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(West, LEXIS through 2005) 7

Tex. Occ. Code Ann. § 155.003
(Vernon 2004) 22

Tex. Occ. Code Ann. §§ 157.002-.057,
204.152-.153, 204.201-.202, 204.205
(Vernon, LEXIS through 2003 legislation) 8-9

Tex. Occ. Code Ann. § 301.152
(Vernon, LEXIS through 2003 legislation) 7

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-115, -130, -140, -150, -160
(West, LEXIS through 2005) 9

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-80A -120B, 40-10, -40
(West, LEXIS through 2005) 7

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(Michie, LEXIS through 2004 legislation) 9

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(Michie, LEXIS through 2004 legislation) 7

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Page

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Page

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TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed March 24, 2006 ..... 1a

Appendix B — Memorandum Opinion And Order In The United States District Court For The Eastern District Of Texas Dated January 13, 2005 ..... 29a

OPINIONS BELOW

The Memorandum Opinion and Order entered in this lawsuit by the United States District Court for the Eastern District of Texas, Tyler Division (the "District Court"), is reported at *Belt v. EmCare, Inc.*, 351 F. Supp. 2d 625 (E.D. Tex. 2005). The opinion of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") of which Petitioners seek review is reported at *Belt v. EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006).

STATEMENT OF JURISDICTION

On March 24, 2006, the Fifth Circuit entered the opinion that Petitioners seek to have reviewed by this Court. Accordingly, jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1) (2000).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. § 213 (2000) — Exemptions:

> (a) Minimum wage and maximum hour requirements. The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to —
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of

the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

29 C.F.R. § 541.3 (2003):

The term *employee employed in a bona fide *** professional capacity* in section 13(a)(1) of the Act shall mean any employee:

. . . .

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance

either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 ½ times the minimum wage provided by section 6 of the Act.

29 C.F.R. § 541.314 (2003) — Exception for physicians, lawyers, and teachers:

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term *physicians* means medical doctors including general practitioners and specialists, and

osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).

(2) Physicians and other practitioners included in paragraph (b)(1) of this section, whether or not licensed to practice prior to commencement of an internship or resident program, are excepted from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession.

(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

STATEMENT OF THE CASE

Under 29 U.S.C. § 213(a), employees employed in a bona fide executive, administrative, or professional capacity are not entitled to receive overtime compensation.[1] But Congress expressly granted to the DOL the authority to define, through the issuance of regulations, who is employed in a bona fide executive, administrative, or professional capacity.[2] Pursuant to the authority expressly granted by Congress, the DOL issued, under notice and comment, 29 C.F.R. § 541.3(e), which provides that an employee is not entitled to overtime compensation if (1) she meets certain professional requirements, and (2) she is

1. 29 U.S.C. § 213(a) (2000).

2. *Id.*

paid on a salary basis (the "Professional Exemption").[3] The DOL also provided, in the same regulation, that an employee is *not* required to be paid on a salary basis in order to qualify for the Professional Exemption if the employee holds a valid license or certificate permitting the practice of law or medicine *or any of their branches* and he or she is actually engaged in the practice thereof (the "Salary Basis Exception").[4]

To further define the scope of the Salary Basis Exception, the DOL issued 29 C.F.R. § 541.314, which was also adopted with notice and comment,[5] providing that the Salary Basis Exception "applies only to the traditional professions of law, medicine, and teaching, and not to employees in related professions which merely serve these professions."[6] In the case of medicine, § 541.314 further provided that the Salary Basis Exception applies to "physicians *and other practitioners* licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians *or practitioners*."[7] This regulation expressly included within the Salary Basis Exception podiatrists, dentists, and even optometrists with only bachelors of science degrees in optometry, but excluded employees who merely serve the medical profession, such as nurses and pharmacists.[8] Thus, according to §§ 541.3 and 541.314, an employee falls within the scope of the Salary Basis Exception if she is licensed to practice and is actually practicing in the field of medical science

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3. 29 C.F.R. § 541.3(e) (2003).

4. *Id.*

5. While the parties and the District Court previously contended, albeit erroneously, that § 541.314 had not been adopted after notice-and-comment rulemaking, Plaintiffs and the DOL informed the Fifth Circuit at oral argument that § 541.314 had in fact been issued with notice-and-comment and was intended to have the force of law.

6. 29 C.F.R. § 541.314 (2003).

7. *Id.* (emphasis added).

8. *See id.*

and healing, as opposed to merely servicing the medical profession.[9]

Texas EM-I Medical Services, P.A. ("Texas EM-I") is a physicians group that operates numerous emergency departments throughout the State of Texas. Texas EM-I is responsible for both the administrative and patient-care aspects of emergency room operation. Thus, Texas EM-I is required to ensure that emergency rooms are adequately staffed with qualified practitioners who are capable of properly caring for patients. To receive assistance in the administrative tasks associated with emergency department operations, Texas EM-I contracted with EmCare, Inc. ("EmCare"). EmCare provides administrative assistance to emergency room operators by providing recruiting, scheduling, malpractice insurance coverage, risk management, and clinician payroll support.

To meet its patient-care obligations, Texas EM-I employs NPs and PAs to provide primary patient care in emergency room settings. NPs and PAs perform medical functions that have traditionally been performed only by physicians, and NPs and PAs perform those functions in the same manner as physicians.[10] It is undisputed that NPs are licensed practitioners in every state in the United States and are personally responsible for diagnosing and managing acute episodic and chronic illnesses, ordering, conducting, supervising, and interpreting diagnostic and laboratory tests and x-rays, developing treatment plans, directing the nursing staff, and prescribing non-pharmaceutical therapies.[11] Further, in at least 47 states, NPs are permitted to

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9. 29 C.F.R. §§ 541.3, 541.314.

10. (*See* Pls.' Resp. to Defs.' Mot. for Summ. J. at 10, 6 R. at 2582.)

11. *See, e.g.*, Ariz. Rev. Stat. §§ 32-1601.12 (LEXIS through 2004 legislation); Ariz. Admin. Code R4-19-504, -505, -507 (LEXIS through 2004 Supp. 04-3); Cal. Bus. & Prof. Code §§ 2834, 2836.1 (Deering, LEXIS through 2005 legislation); Cal. Code Regs. tit. 16, §§ 12-38-

(Cont'd)

prescribe medication (pharmaceutical agents).[12] Similarly, PAs are also licensed practitioners in every state in the United States and are personally responsible for conducting physical exams,

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(Cont'd)

111.5(2), 1482, 1485 (LEXIS through 2005 Reg.); Fla. Stat. Ann. ch. 464.012, 064.012 (Harrison, LEXIS through 2005); Fla. Admin. Code Ann. r. 64B9-4.009 (LEXIS through 2005); Ga. Code Ann. §§ 43-26-3(1), 43-34-26.1 (Harrison, LEXIS through 2004 Session); Ga. Comp. R. & Regs. r. 410-12.03 (LEXIS through 2005 Supp.); 225 Ill. Comp. Stat. 65/15-5, 15-20 (LEXIS through Act 93-1102); Ill. Admin. Code tit. 68, §§ 1305.15, .40 (LEXIS through 2005); Ky. Rev. Stat. Ann. §§ 314.011(7), .042 (Michie, LEXIS through 2004 Session); 201 Ky. Admin. Regs. 20:057.2, .4 (WESTLAW through 2005 Regs.); Md. Regs. Code tit. 10 § 10.27.07.01, .02, .03 (2004); Nev. Admin. Code ch. 632 §§ 632.020, .255, .257, .259, .2595 (LEXIS through 2005-2 Supp.); N.J. Rev. Stat. §§ 45:11-23, -49 (LEXIS through 2005 Session); N.J. Admin. Code tit. 13, § 37-7.1 (LEXIS through 2005 Reg.); N.M. Stat. Ann. § 61-3-3, -23.2 (Michie, LEXIS through 2004 Gen. Election); N.M. Admin. Code tit. 16, §§ 12.2.13 (LEXIS through 2004 Regs.); N.Y. Educ. Law § 6902.3 (McKinney, LEXIS through 2005); N.C. Admin. Code tit. 21, r. 36.0227 (LEXIS through Apr. 2005); 49 Pa. Code § 21.251, .271, .291 (LEXIS through 2005 Supp.); 26 S.C. Code Ann. Regs. R 91-1, -2, -6 (LEXIS through 2004); Tenn. Code Ann. §§ 63-7-123, -126 (LEXIS through 2004 Session); Tenn. Comp. R. & Regs. 1000-4-.01, .03 (LEXIS through 2005); Tex. Occ. Code Ann. § 301.152 (Vernon, LEXIS through 2003 legislation); 21 Tex. Admin. Code § 221.4 (West LEXIS through 2005); 22 Tex. Admin. Code §§ 219.2, 222.4 (West, LEXIS through 2005); Va. Code Ann. § 54.1-2957.01.A, .E (Michie, LEXIS through 2004 legislation); 18 Va. Admin. Code §§ 90-30-60, -80A -120B, 40-10, -40 (West, LEXIS through 2005); *see also* Carolyn Buppert, *Nurse Practitioner's Business Practice and Legal Guide* 18-32, 47-74, 188-226 (2d ed. 2004) (collecting state statutes and regulations). (*See* Meadows Decl. ¶ 9, 5 R. at 2089-92, R. Excerpts at tab D; Murphy Decl. ¶ 9, 5 R. at 2093-96, R. Excerpts at tab D; Webster Decl. ¶ 9, 5 R. at 2097-99, R. Excerpts at tab D; Iscovich Decl. ¶ 9, 5 R. at 2100-02, R. Excerpts at tab D; Harris Decl. ¶ 9, 5 R. at 2282-85, R. Excerpts at tab D.)

12. Carolyn Buppert, *Nurse Practitioner's Business Practice and Legal Guide* 183 (2d ed. 2004).

diagnosing and treating illnesses, ordering and interpreting laboratory tests and x-rays, developing treatment plans, directing the nursing staff, and assisting in surgery.[13] PAs are also, in at

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13. *See, e.g.*, Ariz. Rev. Stat. §§ 32-2501, -2521 to -2522, -2531 to -2533 (LEXIS through 2004 legislation); Ariz. Admin. Code R4-17-101, -204, -301, -302, -303, -305 (LEXIS through 2004 Supp. 04-3); Cal. Bus. & Prof. Code §§ 3501(d), 3502, 3514.1 (Deering, LEXIS through 2005 legislation); Cal. Code Regs. tit. 16, §§ 1399.502, .506, .540, .541, .543, .545 (LEXIS through 2005 Reg.); Fla. Stat. Ann. ch. 458.347(2), (4), (7) (Harrison, LEXIS through 2005); Fla. Admin. Code Ann. r. 64B8-30.012, .003, .006 to .008 (LEXIS through 2005); Ga. Code Ann. §§ 43-34-26(d), -26.1, -102, -103, -105 (Harrison, LEXIS through 2004 Session); Ga. Comp. R. & Regs. r. 360-5-.02 to .04, .07, .12 (LEXIS through 2005 Supp.); 225 Ill. Comp. Stat. 95/4, /7.5, /9, /12, /13 (LEXIS through Act 93-1102); Ill. Admin. Code tit. 68, §§ 1350.20, .40, .55, .80, .90 (LEXIS through 2005); Ky. Rev. Stat. Ann. §§ 311.840, .854, .858, .862 (Michie, LEXIS through 2004 Session); 201 Ky. Admin. Regs. 9:175 (WESTLAW through 2005 Regs.); Nev. Rev. Stat. Ann. 630.015, .271, .273, .275, 639.1373 (Michie, LEXIS through 2004 Session); Nev. Admin. Code ch. 630, §§ 280, 290, 330, 360; ch. 639, §§ 272, 280 (LEXIS through 2005-2 Supp.); N.J. Rev. Stat. §§ 45:9-27.11, .13, .16, .17, .19 (LEXIS through 2005 Session); N.J. Admin. Code tit. 13, §§ 35-2B.2 to .5, .12 (LEXIS through 2005 Reg.); N.M. Stat. Ann. § 61-6-6, -7, -9 (Michie, LEXIS through 2004 Gen. Election); N.M. Admin. Code tit. 16, §§ 15.2 to 15.3, 15.6 to 15.14, 16.8 to 16.9 (LEXIS through 2004 Regs.); N.Y. Educ. Law §§ 6540-6542, (McKinney, LEXIS through 2005); N.Y. Pub. Health Law § 3700 (McKinney, LEXIS through 2005); N.Y. Comp. Codes R. & Regs. tit. 8, § 60.8; tit. 10, §§ 94.1 to .2 (LEXIS through 2005); N.C. Gen. Stat. §§ 90-11, -18(c)(13), -18.1, -18.3 (LEXIS through 2004 legislation); N.C. Admin. Code tit. 21, r. 32S.0101, .0102, .0108, .0109, .0111, .0112 (LEXIS through Apr. 2005); 63 Pa. Stat. Ann. tit. 63, §§ 422.2, .13, .36 (LEXIS through 2004 legislation); 49 Pa. Code §§ 18.122, .141, .143, .151, .152, .155, .157, .158, .162 (LEXIS through 2005 Supp.); S.C. Code Ann. §§ 40-47-910, -935, -945, -955, -960, -965, -970 (Law. Co-op, LEXIS through 2004 legislation); Tenn. Code Ann. §§ 63-19-102, -104, -106, -107, -110, -113; Tenn. Comp. R. & Regs. 0880-3-.02, -.05, -.10, -.21 (LEXIS through 2005); Tex. Occ. Code Ann. §§ 157.002-

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least 48 states, authorized to prescribe medication.[14]

Consistent with the DOL's regulations providing that employees who hold licenses to practice and are practicing in the field of medical science and healing are not entitled to overtime compensation, Texas EM-I and EmCare paid its NPs and PAs on an hourly basis, but did not pay its NPs and PAs overtime compensation to the extent that they worked in excess of 40 hours in one work week. While the NPs and PAs were paid by the hour, however, it is undisputed that they earned approximately $100,000.00 per year.[15]

Despite falling squarely within the terms of the Salary Basis Exception, Plaintiff June Belt, on behalf of herself and others similarly situated ("Plaintiffs"), filed a collective action against

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.057, 204.152-.153, 204.201-.202, 204.205 (Vernon, LEXIS through 2003 legislation); 22 Tex. Admin. Code §§ 185.2, .4, .11, .14, .17, 193.6 (West, LEXIS through 2005); Va. Code Ann. §§ 54.1-2900, -2951.1 to .2, -2952, -2952.1 (Michie, LEXIS through 2004 legislation); 18 Va. Admin. Code §§ 85-50-101, -110, -115, -130, -140, -150, -160 (West, LEXIS through 2005); Wash. Rev. Code §§ 18.71A.010, .020, .040, .060 (LEXIS through 2004 Gen. Election); Wash. Admin. Code §§ 246-918-005, -030, -035, -050, -070, -080, -105, -120, -130, -140 (LEXIS through 2004); W. Va. Code Ann. § 30-3-16 (Michie, LEXIS through 2005 Session); W. Va. Code St. R. §§ 11-1B-3, -4, -6, -7, -13, -14 (LEXIS through 2005 Regs.); Wis. Stat. §§ 448.01, .05, . 20, .21 (LEXIS through 2005 Act 2); Wis. Admin. Code (Med. Exam. Bd.) §§ 8.05, .07 to .09 (LEXIS through 2005 Reg.); *see also* American Academy of Physician Assistants, *Physician Assistants: State Laws and Regulations* (9th ed. 2002) (collecting state statutes and regulations). (*See* Meadows Decl. ¶ 9, 5 R. at 2089-92, R. Excerpts at tab D; Murphy Decl. ¶ 9, 5 R. at 2093-96, R. Excerpts at tab D; Webster Decl. ¶ 9, 5 R. at 2097-99, R. Excerpts at tab D; Iscovich Decl. ¶ 9, 5 R. at 2100-02, R. Excerpts at tab D; Harris Decl. ¶ 9, 5 R. at 2282-85, R. Excerpts at tab D.)

14. *Physician Assistants*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook 2006-07, *available at http://www.bls.gov/oco/ocos081.htm.*

15. (*See, e.g.*, 6 R. at 2195-2264.)

EmCare and Texas EM-I, alleging that NPs and PAs employed by EmCare and Texas EM-I[16] were entitled to overtime compensation. Because it is undisputed that NPs and PAs meet the duties requirement of the Professional Exemption, the only question in dispute was whether NPs and PAs held licenses to practice and did practice in the field of medical science and healing such that they would be included in the Salary Basis Exception and not be entitled to overtime compensation. Accordingly, the parties filed competing motions for partial summary judgment, seeking a determination of whether NPs and PAs practice in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners.

While EmCare and Texas EM-I contended that NPs and PAs fell plainly within the scope of the Salary Basis Exception as it is defined in the regulations, Plaintiffs relied principally on language contained in an opinion letter issued by a DOL administrator in 1974 in response to an unspecified question (the "Opinion Letter"). The Opinion Letter provides, without explanation, that PAs are not entitled to overtime compensation if they perform certain duties and are paid on a salary basis. In determining the parties' motions, the District Court held that 29 C.F.R. § 541.3 was ambiguous because it did not expressly mention whether NPs or PAs fell within the Salary Basis Exception's scope. The District Court did not address whether § 541.314 was ambiguous. Instead, the District Court gave controlling deference to the Opinion Letter and granted Plaintiffs' Motion for Partial Summary Judgment. The District Court expressly held, however, that its order involved a

16. For the purposes of this lawsuit *only*, EmCare does not dispute that it is Plaintiffs' employer. EmCare, however, in no way waives the right to dispute whether it is an employer of Belt, any opt-in Plaintiff or any other individual who could be a Plaintiff in any other matter that is pending or that is filed at any time in the future before this Court, the District Court, any other court of competent jurisdiction, or governmental agency.

"controlling question of law as to which there is a substantial ground for difference of opinion," and thus, pursuant to 28 U.S.C. 1292(b), the District Court certified its order for interlocutory appeal.[17]

Pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, EmCare and Texas EM-I timely filed a Petition for Permission to Appeal the District Court's Order, which was granted by the Fifth Circuit.[18] On appeal, the DOL filed an *amicus* brief in support of Plaintiffs that simply re-stated the arguments asserted by Plaintiffs. In its *amicus* brief, the DOL also argued that § 541.314 plainly defined the Salary Basis Exception.[19]

The Fifth Circuit held that § 541.3 was ambiguous, not because it did not expressly mention NPs and PAs, but because the Texas Medical Practices Act defines those who can practice medicine as those employees who have graduated from an accredited medical school, even though such a definition would exclude the other practitioners expressly included within the Salary Basis Exception. The Fifth Circuit also held that § 541.3 was ambiguous because nurses conceivably could be included within the scope of the Salary Basis Exception under the ordinary meanings of the terms contained in § 541.3, even though § 541.314 expressly excludes nurses as employees that only serve the medical profession. Although the Petitioners and the DOL argued that § 541.314 plainly defined the Salary Basis Exception, the Fifth Circuit, like the District Court, did not determine whether § 541.314 was ambiguous. Instead, the Fifth Circuit held that § 541.3 was ambiguous and that, because of its ambiguity, controlling deference was to be afforded to the Opinion Letter and the *amicus* brief. Accordingly, the Fifth

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17. *See* 28 U.S.C. § 1292(b) (2000).

18. *See id*; Fed. R. App. P. 5.

19. (Br. for the Secretary of Labor as *Amicus Curiae* in Support of the Pls.-Appellees at 18.)

Circuit affirmed the District Court on March 24, 2006. Because the Fifth Circuit's opinion conflicts with this Court's precedent and at least three other United States Courts of Appeals, and because this proceeding involves one or more questions of exceptional importance and substantially affects federal regulations of national application in which there is an overriding need for national uniformity, this petition should be granted.[20]

REASONS FOR GRANTING THE PETITION

An agency's regulations that are issued pursuant to congressional authority and after notice-and-comment rulemaking are to be given the force of law. While agencies often issue additional informal interpretations of such regulations through opinion letters or *amicus* briefs, such informal interpretations cannot be given controlling deference unless the regulations at issue are determined to be ambiguous. The Fifth Circuit, however, gave controlling deference to the Opinion Letter and an *amicus* brief without first determining the ambiguity of § 541.314, which was intended to have the force of law. Under the Fifth Circuit's holding, a court is permitted to circumvent established rules of construction by giving controlling deference to an informal agency interpretation after a finding that a portion of one regulation, standing alone, is ambiguous, while ignoring another regulation that was intended to be read together with the first regulation and to have the force of law. By not properly considering the regulations as a whole in determining any ambiguity, the Fifth Circuit's opinion opens the door to the very type of improper *de facto* creation of new regulations prohibited by this Court's precedent, and, if allowed to stand, the Fifth Circuit's opinion will result not only in unnecessary confusion among the courts regarding the proper deference to be given regulations and less formal interpretive statements, but also in inconsistent application of the regulations at issue, which are constantly the subject matter of litigation.

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20. Sup. Ct. R. 10.

The split among the circuits created by the Fifth Circuit's erroneous interpretation of the regulations requires resolution. The Ninth Circuit previously held that the terms of the regulations at issue were *not* ambiguous, that they should be construed in accordance with their ordinary meanings, and, under that construction, that practitioners other than physicians fell "plainly and unmistakenly" within the scope of the Salary Basis Exception because they were employees licensed to practice and were practicing in the field of medical science and healing, even though the practitioners at issue, veterinarians, were healing animals rather than humans. On the other hand, the Fifth Circuit, using an interpretive method that conflicts with the opinions of this Court and those of the Second and Third Circuits, determined that one of the regulations is ambiguous, in part, because the ordinary meanings of its terms are inconsistent with the meaning of similar language as defined in the Texas Medical Practices Act, even though the Texas Medical Practices Act and the regulation do not cover the same subject matter. Because of the Fifth and Ninth Circuits' conflicting constructions of the regulation's terms, an employee would be entitled to overtime compensation in one part of the country, while an employee performing the same functions in another part of the country would not. Because such a result would frustrate the uniform application of federal labor laws, review is warranted to resolve the conflict.

In addition, this Court should review and ultimately reverse the Fifth Circuit's interpretation of the regulations because of the national impact an improper interpretation of those regulations will have on the medical industry. Under the intentionally broad, unambiguous terms of the regulations, the Salary Basis Exception applies to any employee who is licensed to practice and is actually practicing in the field of medical science and healing, as opposed to those employees merely serving the field of medical science and healing like nurses or pharmacists. It is undisputed that NPs and PAs are licensed and responsible for conducting physical exams, diagnosing and

treating illnesses, ordering and interpreting laboratory tests and x-rays, developing treatment plans, assisting in surgery, and directing the nursing staff in the performance of their duties. In at least 47 states, both NPs and PAs prescribe medication. Further, Plaintiffs readily admit that NPs and PAs perform functions at a level higher than that of Registered Nurses and perform some of the same duties traditionally performed only by physicians. Therefore, unlike nurses or pharmacists who serve the medical profession by performing tasks at the direction of NPs, PAs, and physicians, NPs and PAs actually practice in the field of medical science and healing by performing, in the same manner as performed by physicians, the same medical functions traditionally performed only by physicians. Because the reality of the medical profession today is that NPs and PAs are relied upon heavily throughout the United States to provide primary health care, the manner in which they are compensated is of national importance and should be reviewed by this Court.

A. Because the Fifth Circuit gave controlling deference to the Opinion Letter and the *amicus* brief without first determining the ambiguity of both regulations, the Fifth Circuit's opinion conflicts with this Court's precedent.

The Fifth Circuit improperly gave controlling deference to the Opinion Letter and the DOL's *amicus* brief without first determining the ambiguity of the regulations at issue.[21] In *Christensen*, this Court held that, when an agency issues a regulation intended to have the force of law, such as through notice-and-comment rulemaking and pursuant to congressional authority, that regulation is to be given controlling, or *Chevron*, deference.[22] This Court further held that *Chevron* deference is not to be afforded to the agency's informal interpretations of such regulations—*e.g.*, interpretations issued through opinion

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21. *Belt v. EmCare, Inc.*, 444 F.3d 403, 416 (5th Cir. 2006).

22. *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

letters, agency manuals, or *amicus* briefs—unless the regulations at issue are ambiguous and the informal interpretation is not plainly erroneous or inconsistent with the regulations.[23]

While *Christensen* only involved the interpretation of one regulation, as evident from this Court's opinion in *Barnhart*, agencies often issue multiple regulations intended to have the force of law on the same subject matter.[24] Accordingly, a court must necessarily determine the ambiguity of each regulation to be afforded *Chevron* deference before the court can determine what level of deference, if any, should be given to a less formal interpretation.[25] In fact, this Court has held that giving controlling deference to a less formal agency interpretation in light of an unambiguous regulation intended to have the force of law would be to improperly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[26]

The Fifth Circuit and the District Court, both of which have issued published opinions in this matter, improperly gave controlling deference to the DOL's Opinion Letter and *amicus* brief without determining the ambiguity of the regulations intended to have the force of law. Specifically, as set forth above, Congress expressly granted the DOL the authority to define, *through the issuance of regulations*, who should be considered as employed in a bona fide executive, administrative, or professional capacity such that they would not be entitled to overtime compensation.[27] Pursuant to that authority, the DOL initially issued, after notice-and-comment rulemaking, § 541.3, which set forth the Salary Basis Exception.[28] To further define

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23. *Christensen*, 529 U.S. at 586-87; *Auer v. Robbins*, 519 U.S. 452, 460 (1997).

24. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002).

25. *Christensen*, 529 U.S. at 586-87.

26. *Id.* at 589.

27. 29 U.S.C. § 213(a).

28. *Id.*

the Salary Basis Exception and who should be considered to be employed in a bona fide executive, administrative, or professional capacity, the DOL issued § 541.314, which at the time of the District Court's opinion had been adopted after notice-and-comment. Thus, pursuant to this Court's holding in *Christensen*, the Fifth Circuit was required to first determine whether §§ 541.3 *and* 541.314 were ambiguous before determining what level of deference, if any, should be given to the DOL's less formal statements regarding how the Salary Basis Exception should be applied.[29] The Fifth Circuit, however, held that controlling deference should be given to the Opinion Letter and *amicus* brief after a finding, albeit erroneous, that § 541.3 alone was ambiguous.[30]

The Fifth Circuit's departure from this Court's precedent warrants review because of the confusion created by the Fifth Circuit's opinion and the frequency with which agency regulations are the subject of litigation. In *Christensen*, this Court dealt with only one regulation.[31] In subsequent opinions, this Court has made clear that an agency can issue more than one regulation that is intended to have the force of law on a particular subject matter.[32] Thus, the logical conclusion from those opinions is that an agency's regulations that are intended to have the force of law and that cover the same subject matter should be read together to determine if the agency's position is ambiguous before a court gives controlling deference to any informal interpretation of those regulations. Under the Fifth Circuit's opinion, however, a court need only find an ambiguity in one regulation to give controlling deference to informal *post hoc* interpretations of the regulations, while ignoring the content

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29. *Christensen*, 529 U.S. at 586-87.

30. *Belt*, 444 F.3d at 416.

31. *Christensen*, 529 U.S. at 586-88.

32. *Barnhart*, 535 U.S. at 221; *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001).

of a related regulation intended to have the force of law.[33] Because such an analysis would frustrate Congress's intent that unambiguous agency regulations be controlling, and because the Fifth Circuit's opinion lends itself to the type of *de facto* creation of new regulations prohibited by this Court in *Christensen*,[34] review is warranted to provide clarification on this important issue and to ensure uniform application of agency regulations.

B. Because the proper interpretation of the regulations at issue will have a significant impact on the medical industry in the United States, and because the Fifth Circuit's opinion conflicts with opinions of this Court and the Second, Third, and Ninth Circuit Courts of Appeals, review is warranted.

1. Review is warranted because the Fifth Circuit's opinion conflicts with the Ninth Circuit's interpretation of the Salary Basis Exception and because the provisions of the relevant regulations will continue to have a significant impact on how employers compensate those who practice in the medical profession.

The Fifth Circuit's determination that the phrase "practice of medicine" as used in § 541.3 is a term of art creates a conflict with the Ninth Circuit that warrants review.[35] Specifically, in determining whether veterinarians fell within the scope of the Salary Basis Exception, the Ninth Circuit first considered the language contained in § 541.3(e) and held that the term "medicine" was not defined anywhere in the regulations and was *not* intended to be used as a term of art.[36] Accordingly, the

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33. *See Belt*, 444 F.3d at 416.

34. *See Christensen*, 529 U.S. at 586-88.

35. *See Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124, 1127 (9th Cir. 2004).

36. *Id.*

Ninth Circuit construed the term "medicine" in accordance with its ordinary meaning, *i.e.*, "the science and art of healing and maintaining health."[37] The court further held that the language used in § 541.314 was similarly broad in that it provided that the Salary Basis Exception applied to physicians *and other practitioners* licensed and practicing in the field of medical science and healing.[38] On the basis of that language, and construing the phrase practice of medicine in accordance with its ordinary meaning, the Ninth Circuit held that the intentionally broad language used by the DOL in formulating its regulations plainly and unmistakenly included practitioners other than physicians (veterinarians) within the scope of the Salary Basis Exception.[39]

In conflict with the Ninth Circuit, the Fifth Circuit held that § 541.3 is ambiguous, not on the basis of the ordinary meanings of its terms, but on the basis of the Fifth Circuit's determination that the phrase "practice of medicine" was intended to be used as a term of art and therefore should be construed in the manner in which that phrase is used in the Texas Medical Practices Act.[40] But under the Texas Medical Practices Act, a person is licensed to practice medicine only if she has graduated from an accredited medical school, *i.e.*, only if she is a physician. Under the Texas Medical Practices Act, no "other practitioners" may be engaged in the "practice of medicine," only physicians. Thus, the Fifth Circuit's opinion not only conflicts with the Ninth Circuit in that veterinarians could not "practice medicine" under that definition, but it also conflicts with the plain language of § 541.314 in that dentists, podiatrists, and optometrists with only bachelors of science degrees in optometry could not "practice medicine" thereunder, even though § 541.314 expressly includes those employees

37. *Id.*

38. *Id.*; *see* 29 C.F.R. § 541.314.

39. *Clark*, 390 F.3d at 1127-28.

40. *Belt*, 444 F.3d at 412.

within the Salary Basis Exception.[41] In other words, by not construing the terms contained in § 541.3 in accordance with their ordinary meanings, the Fifth Circuit's opinion conflicts with the Ninth Circuit and nullifies the plain language of § 541.314.

Review is warranted to resolve this conflict because courts will continue to address the language contained in §§ 541.3 and 541.314. While the DOL has revised its regulations since the inception of this litigation, the language contained in §§ 541.3 and 541.314 was adopted almost verbatim into the new regulations after notice and comment.[42] Because of the intentionally broad language used to define the Salary Basis Exception, courts will likely be called upon to apply those terms to other medical practitioners. As it stands now, if a court follows the Fifth Circuit, the court would exclude certain employees, such as veterinarians, from the Salary Basis Exception because they are not licensed to practice medicine under Texas's or any other state's medical practices act. On the other hand, if a court follows the Ninth Circuit, the court would hold that the same employees excluded under the Fifth Circuit's reasoning would be included within the scope of the Salary Basis Exception. Accordingly, because such a result would frustrate the purpose of Congress in having a uniform application of its employment laws, the questions presented in this petition warrant review.

2. Review is warranted because the Fifth Circuit is in conflict with this Court and the Second and Third Circuit Courts of Appeals regarding the proper method for determining whether a regulation is ambiguous.

As discussed above, in interpreting whether an agency's regulation is ambiguous, this Court has held that a court first must determine whether the applicable terms have been defined

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41. *See* 29 C.F.R. § 541.314.

42. *See Belt*, 444 F.3d at 414 n.30.

in the regulations or whether they are intended to be used as terms of art.[43] If the agency intends a term to be used as a term of art, that term can be defined by referring to the industry within which it is used.[44] But where the terms have not been defined and are not intended as terms of art, the terms must be construed in accordance with their ordinary meanings.[45] The Second and Third Circuits have held that, where the ordinary meanings of those terms do not provide sufficient guidance, courts may also consider other statutes that use similar terms to assist with their interpretation, but only if those statutes *cover the same subject matter.*[46]

The terms contained in §§ 541.3 and 541.314 should be construed in accordance with their ordinary meanings without reference to other statutory provisions. Section 541.3(e) provides that the Salary Basis Exception encompasses those employees who hold valid licenses permitting the practice of medicine or any of its branches and who are actually engaged in the practice thereof.[47] It is undisputed that the phrase "practice of medicine" is not defined in the regulations,[48] and there is no indication in the legislative history that those terms were intended to be used as terms of art.[49] Thus, according to this Court, those terms must

43. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1847 (2006).

44. *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974).

45. *S.D. Warren Co.*, 126 S. Ct. at 1847.

46. *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 823 (3rd Cir. 1999); *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 917-18 (2d Cir. 1996).

47. 29 C.F.R. § 541.3.

48. *See Clark*, 390 F.3d at 1127 (holding that "medicine" as used in § 541.3 is not defined in the regulations).

49. *See Clark*, 390 F.3d at 1127 (construing the phrase "practice of medicine" as it is used in § 541.3 in accordance with its ordinary meaning); *cf. Corning Glass Works*, 417 U.S. at 201-02 (holding that legislative history expressly provided that the words used in the statute were intended to be words of art with the same meaning as those used in the particular industry).

be construed in accordance with their ordinary meanings.[50] Practice is defined as "the exercise or pursuit of a profession,"[51] and medicine is defined as "the art or science of preserving health and treating disease."[52] The construction of those terms in accordance with their ordinary meanings is consistent with the intentionally broad language contained in § 541.314, which provides that, in the case of medicine, the Salary Basis Exception applies to "physicians *and other practitioners* licensed and practicing in the field of medical science and healing." The language of § 541.314 is almost identical to the ordinary meaning of the phrase "practice of medicine."[53]

Despite the DOL's evident intent that the terms contained in §§ 541.3 and 541.314 be construed in accordance with their ordinary meanings, the Fifth Circuit held, without explanation, that the phrase "practice of medicine" could be defined by referencing the Texas Medical Practices Act because of its use of similar language.[54] As set forth above, there is no indication in the legislative history that the DOL intended for the phrase "practice of medicine" to be construed as a term of art. In fact, the DOL in its *amicus* brief, while adopting many of the Plaintiffs' arguments verbatim, at no point contends that any terms contained in the regulations should be construed by referencing Texas's or any other state's medical practices act. Thus, to the extent that the Fifth Circuit determined that the phrase "practice of medicine" constitutes a term of art and should be construed accordingly, that holding conflicts with this Court's precedent in that there is no indication from the DOL or any

50. *S.D. Warren Co.*, 126 S. Ct. at 1847.

51. Carol G. Braham ed., Random House Webster's Dictionary 562 (3rd ed. 1998).

52. Webster's Dictionary 447.

53. 29 C.F.R. § 541.314.

54. *Belt*, 444 F.3d at 411-12.

other source that the terms were intended to be construed as terms of art.[55]

Further, to the extent that the Fifth Circuit held that the Texas Medical Practices Act could be referenced to provide further interpretation of the ordinary meanings of the terms contained in the regulations, that holding conflicts with Second and Third Circuit authority. The Second and Third Circuits have held that, if a term's ordinary meaning does not provide sufficient guidance to discern the intent of the statute or regulation, the court may look to other statutory provisions, but only those covering the *same subject matter* and using similar language.[56] While the Fifth Circuit's opinion cites that rule, the actual holding is in conflict because §§ 541.3 and 541.314 do not cover the same subject matter as the Texas Medical Practices Act.[57] Specifically, as set forth above, the Texas Medical Practices Act solely governs the licensure of physicians.[58] Thus, to be licensed to practice medicine under that act, a person must, among other things, graduate from an accredited medical school.[59] On the other hand, §§ 541.3 and 541.314 are intended to define the scope of the Salary Basis Exception, not to determine whether a physician may be licensed to practice medicine in any given state.[60] Further, the regulations on their face intend the practice of medicine to include physicians *and other practitioners*.[61]

Accordingly, the Fifth Circuit's opinion provides, in

55. *Corning Glass Works*, 417 U.S. at 201-02.

56. *Liberty Lincoln-Mercury*, 171 F.3d at 823; *Preferred Physicians*, 85 F.3d at 917-18.

57. *See* 29 C.F.R. §§ 541.3, 541.314; Tex. Occ. Code Ann. § 155.003 (Vernon 2004).

58. Tex. Occ. Code Ann. § 155.003.

59. *Id.*

60. 29 C.F.R. §§ 541.3, 541.314.

61. 29 C.F.R. §§ 541.3, 541.314.

essence, that another statute can be consulted and used to create an ambiguity in the regulations, even though that statute does not cover the same subject matter as the regulations. Because such a holding is in conflict with the interpretive rules of this Court and the Second and Third Circuits, as well as with the plain language of the regulations themselves, review is warranted to resolve the conflict and the unnecessary confusion caused by the Fifth Circuit's opinion.

C. Because of the vital role NPs and PAs have and will continue to play in the practice of medicine, review is warranted to correct the Fifth Circuit's erroneous application of the Salary Basis Exception to NPs and PAs.

Because NPs and PAs are heavily relied upon to provide primary health care, the manner in which NPs and PAs are compensated is an issue of national importance that warrants review by this Court. The title of PA was created by a group of physicians and educators at Duke University, the University of Colorado, and the University of Washington to fill the void left by a shortage of primary-care physicians.[62] Accordingly, because the intended purpose of PAs was to ease the workload of primary-care physicians, PAs were at all times intended to practice medicine in the same manner as primary-care physicians.[63] The extent to which NPs and PAs are relied upon throughout the United States to provide primary health care was underscored in a January 2005 edition of *U.S. News & World Report*. Regarding the current state of primary medical care, the cover story provided, in pertinent part:

> You've probably noticed it at your own doctor's office, the subtle yet revolutionary changes in the way Americans receive their healthcare. The tipoff may have come when a physician assistant wrote

62. *See* Accredited Review Commission on Education for the Physician Assistant, Inc., *History of the ARC-PA, available at http://www.arc-pa.org/General/history.html.*

63. *Id.*

> your child a prescription instead of the pediatrician. If you've recently switched doctors, chances are you saw a nurse practitioner and not the primary-care physician listed on your health insurance card.[64]

The undisputed reality of the medical profession today is that NPs and PAs perform many of the same medical functions traditionally performed only by physicians, in the same manner as physicians have traditionally performed them. Therefore, NPs and PAs fall plainly and unmistakenly within the intentionally broad terms of the Salary Basis Exception, and this Court should review this matter because of the national impact such a determination would have on the medical industry, both practitioners and patients.

Contrary to the Fifth Circuit's opinion, the regulations unambiguously define the Salary Basis Exception.[65] When interpreting a regulation, its terms must be construed in accordance with their ordinary meanings, unless the regulation's terms were intended to be used as terms of art or were defined in the regulations.[66] Further, a regulation's terms are not ambiguous because they are permissive or because they do not expressly mention the particular instance or individual involved in the dispute.[67] As the Fifth Circuit correctly held in *Moore v. Hannon Foods Service, Inc.*, a regulation's ambiguity is to be determined "without reference to proposed interpretations; otherwise, a regulation will be considered 'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed

64. Christopher J. Gearon, *Medicine's Turf Wars*, U.S. News & World Report, Jan. 31, 2005, *available at http://www.usnews.com/usnews/health/articles/050131/31turf.htm.*

65. 29 C.F.R. §§ 541.3, 541.314.

66. *S.D. Warren Co.*, 126 S. Ct. at 1847.

67. *Christensen*, 529 U.S. at 588.

68. *Moore v. Hannon Foods Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003).

to expand or prune its scope."[68] And a regulation is not silent or ambiguous merely because it did not enumerate every type of subclass that would fall under the regulation's intentionally broad definition of the class.[69] Moreover, regulatory provisions must be read together when determining their ambiguity.[70]

Section 541.3(e) provides that the Salary Basis Exception applies to an employee "who is the holder of a valid license or certificate permitting the practice of law or medicine *or any of their branches* and who is actually engaged in the practice thereof."[71] The terms "employee," "practice," "license," and "medicine" have not been defined by the regulations.[72] Further, as set forth above, those terms were not intended to be construed as terms of art.[73] In fact, the DOL did not adopt such an argument, even though it was, albeit erroneously, asserted by Plaintiffs. Accordingly, because § 541.3(e)'s terms were not intended to be construed as terms of art, and because they are not defined in the regulations, those terms must be construed in accordance with their ordinary meanings.[74]

According to the ordinary meanings of the terms contained in § 541.3, the Salary Basis Exception's scope is intentionally broad.[75] "Employee" is defined as "a *person* hired to work for another."[76] "License" is defined as "formal permission from a constituted authority to do something, as to carry on some

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69. *Id.* at 497 n.13.

70. *Gonzales v. Oregon*, 126 S. Ct. 904, 924 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

71. 29 C.F.R. § 541.3(e) (emphasis added).

72. *See Clark*, 390 F.3d at 1127.

73. *See id.*

74. *S.D. Warren Co.*, 126 S. Ct. at 1847.

75. *Auer*, 519 U.S. at 463 (holding that requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes).

76. Webster's Dictionary 231.

business,"[77] and "practice" is defined as "the exercise or pursuit of a profession."[78] Finally, "medicine" is defined as "the art or science of preserving health and treating disease."[79] Thus, according to the ordinary meanings of the terms used to formulate the Salary Basis Exception, any person who has received formal permission from the relevant authority to practice in the art or science of preserving health and treating disease is included within the Salary Basis Exception.

The terms used in § 541.3 are consistent with the unambiguous terms of § 541.314, which further define the scope of the Salary Basis Exception.[80] The DOL issued § 541.314, in part, to answer requests to broaden the scope of the Salary Basis Exception to include engineers, architects, and librarians. Section 541.314 provides in response to those requests that the Salary Basis Exception would only apply to the traditional professions of law, medicine, and teaching.[81] Section 541.314 further provides that the Salary Basis Exception does not apply to pharmacists and nurses who merely serve the medical profession, as opposed to those practitioners who actually practice medicine.[82] Thus, while the DOL refused to extend the Salary Basis Exception beyond the traditional practice of medicine, § 541.314 in no way limits the Salary Basis Exception's application to traditional members of the medical profession, as suggested by Plaintiffs and the DOL in its *amicus* brief. Instead, § 541.314 continues to use the following broad, unambiguous language to define the scope of the Salary Basis Exception: "In the case of medicine . . . [t]he exception applies to physicians *and other practitioners* licensed and practicing in

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77. Webster's Dictionary 415.

78. Webster's Dictionary 562.

79. Webster's Dictionary 447.

80. 29 C.F.R. §§ 541.3, 541.314.

81. 29 C.F.R. § 541.314(a).

82. *Id.*

the field of medical science and healing or any of the medical specialties practiced by physicians or *practitioners*."[83] Thus, as the Ninth Circuit properly held, when reading §§ 541.3 & 541.314 together according to their terms' ordinary meanings, the Salary Basis Exception has been intentionally defined in broad, unambiguous terms such that the exception is only limited by whether an employee is licensed to practice and is practicing in the field of medical science and healing, as opposed to merely serving those practicing in the field of medical science and healing.[84]

Because it is beyond question that NPs and PAs actually practice within the field of medical science and healing, the Salary Basis Exception unambiguously applies to those employees. As set forth above, NPs and PAs are licensed and are responsible for conducting physical exams, diagnosing and treating illnesses, ordering and interpreting laboratory tests and x-rays, developing treatment plans, assisting in surgery, and directing the nursing staff in the performance of their duties. In at least 47 states, both NPs and PAs prescribe medication. Plaintiffs readily admit that they "perform functions at a level higher than that of a Registered Nurse and perform some of the same duties *traditionally* performed by physicians."[85] Plaintiffs further admit that they are responsible for reviewing patient charts, interviewing and examining patients, conducting physical exams, ordering and interpreting laboratory tests and x-rays, formulating diagnoses, developing treatment plans, and *directing the nursing staff*.[86] Further, the DOL's Occupational Outlook

83. 29 C.F.R. § 541.314(b) (emphasis added).

84. *Clark*, 390 F.3d at 1127-28.

85. (*See* Pls.' Resp. to Defs.' Mot. for Summ. J. at 10, 6 R. at 2582.)

86. (Belt Dep. 47:7-23, 53:2-10, 56:7-17, 4 R. at 1848, 1849, & 1850; Jones Dep. 19:2-19, 41:3-17, 59:13-22, 4 R. at 1856, 1861, & 1865; Mounce Dep. 39:7-13, 42:3-8, 4 R. at 1881, 1884; Brazeau Dep. 53:18-20, 5 R. at 2125; Pls.' Resp. to Defs.' Mot. for Summ. J. at 10, 6 R. at 2582.)

Handbook expressly provides that PAs "practice medicine,"[87] and when referring to NPs, the handbook provides that they "are considered primary health care *practitioners* and work independently or in collaboration with physicians."[88] Thus, every source relied upon to determine the scope of NPs and PAs' practices provides that they actually *practice* in the field of medical science and healing. As a result, NPs and PAs plainly and unambiguously fall within the broad, unambiguous scope of the Salary Basis Exception.[89] Because the DOL's Opinion Letter and *amicus* brief constitute *post hoc* applications that not only are inconsistent with the regulations' plain terms but also wholly ignore the undisputed reality of NPs' and PAs' actual practices, this Court should review this matter and ultimately reverse the Fifth Circuit's opinion.

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87. *Physician Assistants*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook 2006-07, *available at http://www.bls.gov/oco/ocos081.htm.*

88. *Nurse Practitioners*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook 2006-07, *available at http://www.bls.gov/oco/ocos083.htm* (emphasis added).

89. *See Clark*, 390 F.3d at 1127-28.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 24, 2006

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-40370

March 24, 2006, Filed

June Belt, on Behalf of Herself and on Behalf of All Others Similarly Situated; Paul Maiocco, Washington Plaintiff; Donald Christian, New York Plaintiff; Lucille Moylan, Illinois Plaintiff; Victor Ambrosia, Illinois Plaintiff; Huntington Yeo; Daryl Wein, UCL and California Plaintiff; Jeanette Shelly, UCL and California Plaintiff; James Perry, UCL and California Plaintiff; Ronald Martinez, UCL and California Plaintiff; Julie Jung, UCL and California Plaintiff; Deborah Gaskins, UCL and California Plaintiff; David Dona, UCL and California Plaintiff; Mason Carlin, UCL and California Plaintiff; Susan Bertelsen, UCL and California Plaintiff; Neil Adler, UCL and California Plaintiff; Deborah Nichols, Arizona Plaintiff; FLSA Employees,

Plaintiffs-Appellees,

v.

EMCARE, INC., and Texas EM-I Medical Services, P.A.,

Defendants-Appellants.

Appendix A

JUDGES: Before King, Smith and Benavides, Circuit Judges.

OPINION BY: Jerry E. Smith

OPINION:

Jerry E. Smith, Circuit Judge:

This appeal presents the question whether physician assistants ("PA's") and nurse practitioners ("NP's")[1] qualify for the professional exemption to the overtime requirements of the Fair Labor Standards Act ("FLSA"). Plaintiffs, and the Department of Labor ("DOL") as *amicus curiae*, contend that the regulation interpreting the professional exemption, 29 C.F.R. § 541.3 (1973), does not speak to the precise question before us and that the agency's informal interpretive statements excluding plaintiffs from the exemption merit deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). We agree and affirm, and remand for further proceedings.

I.

Plaintiffs are 59 PA's and 20 NP's who provide health care services for EmCare, Inc., in hospital emergency rooms in twenty states.[2] Plaintiffs are paid hourly at a flat rate for

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1. Although the defendant employers tend to refer to plaintiffs by their official titles, plaintiffs are prone to use the collective term "mid-level providers." Recognizing that the respective choices of terms are strategic, we use the official titles.

2. Defendant Texas EM-I is a physicians group responsible for adequately staffing hospital emergency rooms. It contracted with (Cont'd)

all hours worked, including overtime (i.e., all hours over forty in a workweek). The DOL's Bureau of Labor Statistics' Occupational Outlook Handbook provides an overview of the job descriptions of PA's and NP's:

> Physician assistants (PAs) practice medicine under the supervision of physicians and surgeons ... PAs are formally trained to provide diagnostic, therapeutic, and preventive health care services, as delegated by a physician. Working as members of the health care team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x rays, and make diagnoses. They also treat minor injuries, by suturing, splinting, and casting. PAs record progress notes, instruct and counsel patients, and order or carry out therapy. In 48 States and the District of Columbia, physician assistants may prescribe medications. PAs also may have managerial duties. Some order medical supplies or equipment and supervise technicians and assistants.[3]

(Cont'd)
EmCare to help perform administrative tasks. EmCare states that it assists Texas EM-I by "providing recruiting, scheduling, malpractice insurance coverage, risk management, and clinician payroll support." We refer to defendants jointly as "EmCare."

3. *Physician Assistants, in* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2006-07, http://www.bls.gov/oco/ocos081.htm (last visited March 13, 2006).

Appendix A

> Nurse practitioners provide basic preventive health care to patients, and increasingly serve as primary and specialty care providers in mainly medically underserved areas . . . In most States, advanced practice nurses can prescribe medications.[4]

Plaintiffs sued EmCare for back wages and liquidated damages under the FLSA, alleging that EmCare was violating the FLSA by failing to pay time-and-a-half compensation for overtime. EmCare responded that it did not owe plaintiffs additional pay, because they qualify for an exemption as *bona fide* professionals under 29 C.F.R. § 541.3(e) (1973). The parties filed cross-motions for partial summary judgment on this issue, and the district court granted plaintiffs' motion. *See June Belt v. EmCare Inc.*, 351 F.Supp.2d 625 (E.D.Tex.2005).

The court reasoned that § 541.3(e) is ambiguous, so it deferred to the DOL's informal pronouncements on § 541.3(e), including a DOL opinion letter and the Wage and Hours Field Operations Handbook, which tended to show that PA's and NP's must be paid on a salary basis to be exempt from the FLSA. The court based its decision on *Auer*, 519 U.S. at 461, 117 S.Ct. 905, which held that an agency's interpretation of its own ambiguous regulation is controlling unless clearly erroneous or inconsistent with the regulation.

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4. *Nurse Practitioners, in* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2006-07, http://www.bls.gov/oco/ocos083.htm (last visited March 13, 2006). Plaintiffs and the DOL represent that the duties of PA's and NP's are almost indistinguishable.

Appendix A

The court also considered the history of the FLSA's professional exemption, which showed that the DOL had rejected earlier efforts to expand the exemption to include other professionals, such as engineers and architects, and that the NP and PA professions had not fully developed when the exemption was created. The court further considered the latest version of the applicable regulations, effective August 23, 2004,[5] which codified a previous informal interpretation of § 541.3(e) (i.e., provided notice and comment), requiring that certain analogous professions, such as nurses and certified medical technologists, be salaried to be exempt from the overtime requirements. The court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b),[6] and we granted leave to appeal.

II.

The FLSA provides that a covered employee shall receive compensation at one-and-one-half times the regular rate for every hour over forty worked during the week,[7] but not if he

5. Though the district court found the 2004 revisions instructive, the facts underlying this case occurred before the recent amendments took effect. Therefore, this case is governed by the regulations as codified in 1973.

6. A district court may certify an order for interlocutory appeal under § 1292(b) where the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation."

7. "[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods

(Cont'd)

is "employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. § 213(a)(1). Pursuant to this authority, the DOL, after notice and comment, issued § 541.3, which defines a "bona fide . . . professional" as an employee who satisfies certain duty requirements[8] and "is compensated for services on a salary or fee basis" (the "salary-basis test").[9]

(Cont'd)
for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

8. The relevant duty provisions require that an employee's (a) "primary duty consist[ ] of the performance of ... [w]ork requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study," (b) "work requires the consistent exercise of discretion and judgment in its performance," (c) "work is predominantly intellectual and varied in character," and (d) at least 80 percent of the employee's time must be so occupied. 29 C.F.R. § 541.3(a)-(d) (1973).

9. *Id.* § 541.3(e). Neither side argues that the DOL lacked authority to issue these implementing regulations. An employee is considered paid on a "salary ... basis" if "under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation." *Id.* § 541.118(a) (1973).

Section 541.3(e) further provides that the salary-basis test does not apply to "an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof" (the "salary-basis exception"). Because the parties agree that plaintiffs satisfy the duty requirements of the professional exemption and are paid hourly, the sole interpretive issue in this appeal is whether NP's and PA's hold a license permitting, and actually engage in, "the practice of . . . medicine or any of [its] branches."

If NP's and PA's practice medicine within the meaning of § 541.3(e), plaintiffs do not need to satisfy the salary-basis test to qualify for the exemption, and EmCare can deny additional overtime pay. If, however, plaintiffs do not practice medicine under § 541.3(e), they are subject to the salary-basis test, they do not fall within the exemption, and they are eligible for time-and-a-half compensation. We are the first circuit to address the precise issue presented by this case.

III.

When confronted with a statute administered by an executive agency, we defer to the agency's interpretation of the statute if (a) the statute is silent as to the precise question at issue and (b) the agency's interpretation is reasonable.[10] We employ a similar two-step test when interpreting an agency regulation. First, we ask whether the regulation is

10. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

"ambigu[ous] with respect to the specific question considered."[11]

Second, if the regulation is ambiguous, the agency's interpretation (as contained in, e.g., opinion letters) is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461, 117 S.Ct. 905 (articulating the rule in the context of interpreting a different aspect of the salary-basis test) (internal quotations omitted). If the regulation is unambiguous, we may still consider agency interpretation, but only according to its persuasive power.[12]

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11. *Moore v. Hannon Food Serv.*, 317 F.3d 489, 495 (5th Cir.2003); *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (finding *Auer* deference appropriate "only when the language of the regulation is ambiguous").

12. *Moore*, 317 F.3d at 495; *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655 (stating that "interpretations contained in formats such as opinion letters are entitled to respect ... but only to the extent that those interpretations have the power to persuade.") (internal quotations omitted). The Court described this degree of deference in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944):

> We consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Appendix A

A.

EmCare argues that PA's and NP's unambiguously practice medicine or a branch of medicine within the meaning of § 541.3(e), and plaintiffs maintain the regulation does not speak to this precise question. Before addressing the issue on the merits, however, plaintiffs contend it is waived because EmCare raises it for the first time on appeal, having consistently represented to the district court that § 541.3(e) is ambiguous, and having relied instead on the interpretive regulation, 29 C.F.R. § 541.314 (1973), to make its case.

EmCare replies that "an argument is not waived on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it."[13] The district court held that "[t]hese regulations do not expressly address whether physician assistants and nurse practitioners are exempted from the salary-basis test, and, on this issue, the regulation is therefore ambiguous." *Belt*, 351 F.Supp.2d at 627.

We have spoken to this waiver issue:

> If a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.

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13. *Lifemark Hosps., Inc. v. Liljeberg Enters.*, 304 F.3d 410, 428 n. 29 (5th Cir. 2002).

FDIC v. Mijalis, 15 F.3d 1314, 1327 (5th Cir.1994). We have noted, however, that "[n]o bright-line rule exists for determining whether a matter was raised below." *N.Y. Life Ins. Co. v. Brown,* 84 F.3d 137, 142 n. 4 (5th Cir.1996).

EmCare's corporate representative, Mr. Wilson, stated under oath that EmCare was relying only on the DOL's interpretive regulation, not § 541.3. EmCare contends, however, that it argued to the district court that the court should not rely on a 1974 DOL opinion letter because plaintiffs "are included within the unambiguous terms of § 541.3 and § 541.314, and that any agency interpretation of those regulations should be given only persuasive deference, if any, under *Skidmore.*"

Our review of the record, coupled with the fact that EmCare can provide no specific quotation or any excerpt from any district court filing to support its claim, suggests EmCare did not "press ... the argument" in the district court. *Mijalis,* 15 F.3d at 1327. Because, however, a finding that § 541.3 is ambiguous was necessary to the district court's ultimate conclusion that it was appropriate to defer to the agency's informal interpretive statements under *Auer,* the issue was sufficiently raised for the court to rule on it, *see Liljeberg,* 304 F.3d at 428 n. 29, and is preserved for appeal.

B.

Plaintiffs claim that regulatory exemptions from the FLSA must be "narrowly construed against the employers seeking to assert them and their application limited to those [employers] plainly and unmistakably within their terms and

spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). In *Arnold,* however, the Court applied its canon of strict construction against employers in the course of interpreting ambiguous *statutory* language in the former exemption from FLSA overtime requirements for a retail establishment. *See* 29 U.S.C. § 213(a)(2), (4) (1949). Because there was no regulatory interpretation of the relevant provisions of § 213, the Court needed to consider legislative history, past precedent, and canons of construction to reach its result. *See Arnold,* 361 U.S. at 392-94, 80 S.Ct. 453. Here, the current § 213(a)(1) explicitly gives the DOL authority to define and cabin the definition of "bona-fide ... professional" and hence the scope of the professional exemption. It would be inappropriate to apply a canon of strict (as opposed to fair) construction to the agency's discretionary exercise of its own, lawfully delegated authority. [14]

Therefore, because the regulations do not define the terms used in § 541.3(e), we must consider the words' ordinary meaning.[15] EmCare argues that capacious language does not automatically entail ambiguity and that NP's and PA's unambiguously fall within the broad scope of § 541.3(e).

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14. *See Auer,* 519 U.S. at 463, 117 S.Ct. 905 ("A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.").

15. *See Gore, Inc. v. Espy,* 87 F.3d 767, 773 (5th Cir.1996) (holding that where the regulations do not provide a definition, "we must first determine whether the Secretary applied the ordinary meaning of that term.").

EmCare relies on caselaw, dictionary definitions, and the employment duties of NP's and PA's to make its argument.

First, in *Moore* we considered 29 C.F.R. § 541.118(a)(6), which provides a "window of correction" for employers who make improper deductions from the paychecks of exempt employees under the FLSA. The regulation states that an employee will automatically lose exempt status unless the deduction is made through "inadvertence, or is made for reasons other than lack of work." *Id.* at § 541.118(a)(6). We reasoned that the relevant deductions in that case, made as a disciplinary penalty for cash register shortages, were "made for reasons other than lack of work" and therefore could be corrected by the employer. *Moore,* 317 F.3d at 496-98. In the course of reaching our decision, we noted that

> [t]he presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered "ambiguous" merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.

Id. at 497. EmCare cites this language to support its contention that we should give no weight to agency interpretations that seek to "narrow" the reach of § 541.3(e) to exclude NP's and PA's merely because the regulation does not explicitly mention them.

Moore is distinguishable: We held, based on the regulation's language, that "lack of work" exhausted the universe of reasons why an employer could not correct an improper deduction. *Moore*, 317 F.3d at 497 (applying reasoning akin to *expressio unius*). Because disciplinary deductions were not made for "lack of work,"[16] there was no "ambiguity with respect to the specific question considered." *Id.* at 495. In contrast, § 541.3(e) contains no similarly forthright exclusionary language: Just because a regulation limited to persons "actually engaged in the practice" of medicine "or any of [its] branches" must exclude *someone*, this fact does not make it obvious whether NP's and PA's fall within its scope.[17]

Likewise, in *Christensen* the Court considered a regulation that allowed employers to contractually obligate employees to take mandatory leave to reduce accrued

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16. The Secretary of Labor made no effort in *Moore* to argue that the deductions in question were made for "lack of work." Instead, the Secretary argued, despite the text of the regulation, that *no* employer who engages in a practice of impermissible deductions can cure the problem through the window of correction, except for inadvertence. *See Moore*, 317 F.3d at 493-94 (quoting *Klem v. County of Santa Clara*, 208 F.3d 1085, 1091 (9th Cir.2000)). In contrast, the instant parties present competing positions on whether NP's and PA's fall within the general regulatory language; i.e., the "branches" of medicine.

17. *Moore* would be more helpful to EmCare if, for example, § 541.3(e) stated that all employees in medicine or related fields, "other than interns and residents," qualify for the professional exemption. Because NP's and PA's plainly are not interns or residents, they likely would fall within the broad scope of the regulation, even if the agency offered a contrary interpretation.

compensatory time.[18] In that case, Harris County implemented a mandatory policy, not in the initial employment agreements, but only after it became apparent that the county could not pay employees for accrued time. Plaintiffs relied on a DOL opinion letter that stated employers could institute this policy only in the text of the agreement itself. *Christensen,* 529 U.S. at 581, 120 S.Ct. 1655.

The Court found that the letter was not controlling because the regulation was unambiguous: It *permitted* employers to include a compelled use clause in an agreement ("*may* include"), but by no means *required* them to do so. *Id.* at 588. Therefore, the Court held that absent an express prohibition, the county could pursue its policy of compulsory leave. *Id.* Because the regulation in *Christensen* was unambiguous, even though it did not discuss every method the county could use to implement its policy, EmCare argues that § 541.3(e) is also unambiguous, even though it fails specifically to discuss whether NP's and PA's fall within its scope.

EmCare's reliance on *Christensen* is misplaced. The regulation there spoke directly to the binary issue posed by the case: Did the agency exclude non-contractual methods of enforcing a compelled leave policy? *Moore* posed a similar yes-or-no question: Did the rule deny the window of correction to any employer that deducted pay for any reason besides lack of work?

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18. *See Christensen,* 529 U.S. at 587-88, 120 S.Ct. 1655; 29 C.F.R. § 553.23(a)(2) (providing that "the [employment] agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [the relevant statute]").

Appendix A

It is possible to pose the question in this case in a similar way: Does the regulation exempt from the FLSA anyone who practices medicine or one of its branches? The problem is that one cannot answer this question without addressing the key terminological dispute: whether NP's and PA's practice medicine or a branch of medicine. When the courts in *Moore* and *Christensen* found broad language unambiguous, they were not confronted with the taxonomic difficulties presented here.

EmCare tries to resolve this problem with dictionary definitions; most importantly, that the ordinary meaning of medicine is "the art or science of preserving health and treating disease." RANDOM HOUSE WEBSTER'S DICTIONARY 47 (3d ed.1998). Using that broad definition and the licensing requirement of § 541.3(e), EmCare formulates its proposed reading of the rule, which is the analytical core of its entire argument, as follows: "[A]ny person who has received formal permission from the relevant authority to practice in the art or science of preserving health and treating disease is included within the Salary Basis Exception." EmCare argues that NP's and PA's unambiguously fall within this definition because they are (1) licensed and (2) act to preserve health and treat disease.[19]

The decision in *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124, 1127 (9th Cir.2004), lends some support to EmCare's position; that court held, when considering the applicability of § 541.3(e) to veterinarians, that "[l]ogically as well as linguistically, veterinary medicine is a 'branch' of medicine." The court used the "ordinary,

19. *See supra* notes 3-4 and accompanying text.

dictionary meaning of the terms" of the regulation to reinforce its view, *id.*, which is language almost identical to EmCare's proposed formulation: "[A] doctor of veterinary medicine is a practitioner licensed and practicing in the field of medical science and healing on animals, a branch of medicine." *Id.* at 1128.

Nevertheless, *Clark* is inapposite. First, the fact that *Clark* also considered § 541.314, the DOL interpretive regulation, suggests that that court may have believed (or at least assumed *arguendo*) that § 541.3(e) is ambiguous. *See Clark*, 390 F.3d at 1127. Second, and more importantly, plaintiffs argue that the "practice of ... medicine" is a term of art that should be construed as a single phrase.[20]

For example, neither NP's nor PA's qualify to "practice medicine" under Texas law.[21] Wilson conceded that, as far as he was aware, NP's and PA's are not licensed to practice medicine within the meaning of any state's medical practices

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20. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (noting that "technical terms of art should be interpreted by reference to the trade or industry to which they apply").

21. *See, e.g., Weyandt v. State*, 35 S.W.3d 144, 148 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (affirming jury verdict of guilty for advanced NP practicing medicine without a license); *Bradford v. Alexander*, 886 S.W.2d 394, 397 (Tex.App.-Houston [1st Dist.] 1994, no pet.) (stating that PA does not practice medicine as contemplated by the former Texas Medical Liability and Insurance Improvement Act).

law.[22] EmCare gives no satisfactory answer why this evidence should not count toward finding ambiguity in the regulation, other than to note that the DOL nowhere explicitly adopted any state's definition of medical practice.

Though we routinely consult dictionaries as a principal source of ordinary meaning,[23] we may also look to other statutes dealing with the same subject that use identical, or nearly identical, language, to resolve a difficult interpretive problem.[24] The fact that NP's and PA's are not licensed to practice medicine under any state's medical practices statute

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22. For example, the Texas Occupancy Code defines "practicing medicine" more strictly as "the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services." TEX. OCC.CODE § 151.002. The Code lists neither PA's nor NP's as licensed to practice the healing arts. *See id.* § 104.003.

23. *United States v. Orellana*, 405 F.3d 360, 365 (5th Cir.2005) (quoting *Thompson v. Goetzmann*, 337 F.3d 489, 497 n. 20 (5th Cir.2003)).

24. *See Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 917-18 (2d Cir.1996) (interpreting the word "discriminate" by reference to ordinary meaning and its use in other statutes); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 823 (3rd Cir.1999) (noting the rule and citing 2B NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § § 51.01, 51.02, 51.03 (5th ed.1992)); *United States v. Gibson Specialty Co.*, 507 F.2d 446, 450 (9th Cir.1974) (noting that the word "facilitate" was held to have its ordinary meaning in the context of the statute at issue and other statutes).

is strongly persuasive evidence that these professions do not view "practicing medicine" as part of their job description. It is plausible that the words "or any of [its] branches" in § 541.3(e) are limited to traditional medical fields whose licenses *are* recognized by the states; e.g., osteopath, dentist, chiropractor, or optometrist. *See, e.g.*, TEX. OCC.CODE § 104.003.

Also, it is difficult to draw a limiting principle from EmCare's proposed definition: It would seem that registered nurses are both (1) licensed and (2) practice the art or science of preserving health and treating disease. But, the courts and DOL interpretive regulations have rejected the applicability of the professional exemption to registered nurses.[25] This evidence does not suggest that § 541.3(e) unambiguously *excludes* PA's and NP's, but it is sufficient for us to find that § 541.3(e) is ambiguous and to look to DOL's interpretive statements for additional guidance.

C.

The DOL issued in 1949, and revised in 1973, an interpretive regulation (without notice and comment) regarding the meaning of the phrase "or any of its branches" in § 541.3(e):

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25. *See, e.g.*, 29 C.F.R. § 541.314(b)(3) (1973); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1061 n. 1 (2d Cir.1988) (holding that § 541.3(e) does not apply to nurses); *Harrison v. Washington Hosp. Ctr.*, 1979 WL 1923, at *2-*3 (D.D.C.1979) (same).

Appendix A

Exception for physicians, lawyers, and teachers.

(a) . . . This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).

(2) [Section excepting interns and residents from salary-basis test omitted]

(3) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 C.F.R. § 541.314(a), (b)(1)-(3) (1973). Because neither PA's nor NP's are specifically mentioned, we must ask whether, under § 541.314, plaintiffs are members of the "traditional profession[ ] of . . . medicine" or "related professions which merely service the [medical] profession."

EmCare reasons that the language of § 541.314(b)(1) is intentionally broad, and EmCare reiterates that anyone who holds a license and practices in a medical field qualifies for the salary-basis exception. In *Clark,* the court concluded that veterinarians are "other practitioners" within the meaning of § 541.314(b)(1), because the DOL did not intend the list provided to be exhaustive and because vets practiced "in the field of medical science and healing," albeit on animals. *Clark,* 390 F.3d at 1127. Plaintiffs point out, however, that the *Clark* court supported its interpretation by citing the DOL's Occupational Outlook Handbook, which lists as "Related Professions" to veterinarians "chiropractors, dentists, optometrists, physicians and surgeons, and podiatrists" but does not list any of these fields as "Related Professions" to NP's and PA's.[26]

Plaintiffs rely on the words "traditional professions of law, medicine, and teaching" to argue that NP's and PA's cannot possibly fall within the scope of § 541.314(b)(1) because these professions developed only in the mid-1960's and therefore did not exist in 1949 and could hardly have

26. *See id;* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, *supra* notes 3 and 4. Although *Clark* cites the 2000 Handbook, the current version includes, *inter alia,* "physicians and surgeons" as "Related Occupations" for Registered Nurse. *See supra* note 4.

been traditional in 1973.[27] EmCare predictably replies that job duties, not job titles, should control who qualifies as a traditional practitioner,[28] and because PA's and NP's perform many of the traditional *duties* of physicians, they should qualify under the broad language of § 541.314(b)(1).

The best textual argument drawn from § 541.314(b) is that subheading (3) specifically excludes NP's from the salary-basis exception under the general category of "nurses." The DOL has repeatedly categorized NP's under the heading of "Registered Nurses" and has noted than an NP is a nurse with advanced academic or clinical training.[29] Plaintiffs also point out that PA's and NP's are not "physicians, lawyers, [or] teachers" as indicated in the title of § 541.314. In sum, though the text of § 541.314 alone does not suffice to reveal entirely the agency's position on this issue, plaintiffs' case gains some traction from straightforward textual analysis.

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27. *See* Elizabeth Harrison Hadley, *Nurses and Prescriptive Authority: A Legal and Economic Analysis*, 15 AM. J.L. & MED. 245, 268 n.104 (1989) (noting that the first training programs for NP's and PA's arose in the 1960's).

28. To that end, EmCare notes that other practitioners with similarly limited responsibilities also qualify for the salary-basis exception under § 541.314; these include optometrists, who often cannot write prescriptions or perform eye surgery, and interns and residents, who must work under a physician's supervision.

29. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 4 (including NP's under "Registered Nurses" heading and listing NP as an "advanced practice nursing specialt[y]").

Appendix A

The parties next turn to the history of § 541.314(b). Plaintiffs emphasize in particular that the DOL has resisted efforts to expand the salary-basis exception several times since its inception, rejecting a proposal in 1949 to include "architects, engineers, and librarians" and specifically excluding pharmacists and nurses. The official report on the 1949 proposals stated, as the reason for keeping the salary-basis exception limited to lawyers and doctors, the following: "the traditional standing of these professions, the recognition of doctors and lawyers as quasi-public officials, [ ] the universal requirement of licensing by the various jurisdictions[, and the] relatively simple problems of classification presented by these professions." U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS ON THE PROPOSED REVISIONS OF REGULATIONS, PART 541, 77 (1949).

EmCare maintains that the history poses no obstacle to its position, because unlike architects, engineers, and librarians (at least historically), NP's and PA's require a license to practice, and unlike nurses and pharmacists, NP's and PA's help develop treatment plans for patients. Hence, Emcare represents that nowhere in the history does the DOL ever exclude a "practitioner" (as EmCare defines that term) of medical science or healing.

The parties also reference the 2004 amendments to the DOL regulations as persuasive authority. The amendments effectively adopted § 541.314 after notice and comment, without substantive change,[30] thereby tending to show that

30. *See* 29 C.F.R. § 541.304. The DOL noted that it had "received few comments on this provision and does not believe any substantive changes are necessary in light of those comments." 69 Fed.Reg. 22,122, 22,158 (Apr. 23, 2004).

the text of § 541.3(e) does not contradict the former § 541.314. EmCare notes that the new regulations specifically list PA's alongside nurses and technologists as "learned professionals" who satisfy the duty requirements for the professional exemption, *id.* at § 301(e)(4), but does not include PA's among nurses and technologists in the list of professions that fall outside the salary-basis exception, *id.* at § 541.600(e). Though this observation alone is insufficient to show that EmCare should prevail, it does support EmCare's case somewhat.[31]

Plaintiffs and the district court also noted a statistical chart in the 2004 rule's preamble that shows that 53,420 hourly paid PA's and 34,053 salaried PA's are subject to the salary-basis test; no physicians, dentists, or optometrists, however, are subject to it. The court reasoned that because the DOL had not changed the substance of the 1973 rule in 2004, the salary-basis exception included PA's both before and after the revisions. *See Belt,* 351 F.Supp.2d at 632-33. EmCare contends that we cannot consider the preamble because it is not a "sufficiently clear" indication of the agency's intent to bind itself to the underlying policy, *see Kennecott Utah Copper Corp. v. United States Dep't of Interior,* 88 F.3d 1191, 1223 (D.C.Cir.1996), and because the *Clark* court determined that veterinarians fall within the

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31. The district court's reliance on this point to support plaintiffs' position seems an unnatural inference. The court basically reasoned that because all three professions are expressly mentioned in the duty section, all three should also be excluded from the salary-basis exception, even though that section mentions only nurses and technologists. *See Belt,* 351 F.Supp.2d at 632.

salary-basis exception even though the preamble also lists 1,037 hourly-paid vets and 16,267 salaried vets as subject to the salary-basis test.[32]

The most specific DOL interpretive statements on point include a 1974 DOL opinion letter and 1994 Field Operations Handbook (which contains almost identical language to the opinion letter) that state that PA's need to be compensated on a salary basis to qualify for the Professional Exemption.[33] EmCare does not dispute the meaning of the letter and Handbook but repeats its position that we should not consider agency interpretations in light of the fact that the 1973 regulation, § 541.3(e), is unambiguous; EmCare also questions the thoroughness with which the agency considered its position in the letter. Finally, the DOL's *amicus* brief unambiguously adopts the position that NP's and PA's do not qualify for the professional exemption.

D.

The DOL's interpretive statements come to this court in a wide variety of formats, and we must decide what weight to give them under our precedents. We conclude that *Auer* applies, so we give controlling weight to the DOL's position

32. Also, EmCare notes that no NP's are listed as covered by the salary-basis test; therefore, we should assume that they, like physicians, fall within the salary-basis exception.

33. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 22d23 (1994), *available at* http://www.dol.gov/esa/whd/FOH/FOH_ Ch22.pdf (stating that, to qualify, the PA must be "compensated for his or her services on a salary basis of not less than $250 a week, exclusive of board, lodging, or other facilities").

adopted in the 1974 opinion letter, 1994 Handbook, and *amicus* brief, excluding PA's (and by extension, NP's) from the professional exemption to the FLSA overtime rules.

In *Auer,* the Court found that the Secretary's *amicus* brief sufficed to show how the DOL interpreted its own ambiguous regulation: The brief "is in no sense a '*post-hoc* rationalization' advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer,* 519 U.S. at 462, 117 S.Ct. 905.

Similarly, there is no reason here to doubt the good faith of the Secretary's position, as *amicus,* that NP's and PA's must satisfy the salary-basis test. In particular, the position is consistent with the department's 1974 opinion letter (written one year after interpretive regulation § 541.314) and 1994 Handbook, which explicitly subject PA's to the salary-basis test, and the DOL's classification of NP's as a subset of registered nurse in its Occupational Outlook guide. Also, the history of the exception suggests that the agency intended to limit its reach to traditional medical practitioners, and state licensing regimes appear to mirror this approach. Although it seems beyond question that NP's and PA's assume many of the traditional duties of doctors, the language of § 541.3(e) "comfortably bears the meaning the Secretary assigns." *Id.* at 461, 117 S.Ct. 905.

Our decision in *Moore* does not require a contrary result. There we noted that "[*Chevron*] deference is not appropriate for an interpretation of a regulation found in an *amicus curiae*

brief."[34] We recognized, 317 F.3d at 494, however, that the Court in *Auer* had given controlling weight to an *amicus* brief, and we correctly concluded that the critical question after *Christensen*, in deciding when to defer to informal interpretations of agency rules, is whether the underlying regulation is ambiguous.

We did not have occasion to defer to the Secretary's position as *amicus* in *Moore*, because the agency rule was plain. *See id.* at 497. Because, however, we decide that § 541.3(e) is ambiguous, we give controlling weight to the DOL opinion letter, Handbook, and *amicus* brief under *Auer*-more than the mere respect required by *Skidmore*.[35]

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34. *Moore*, 317 F.3d at 494; *see also Christensen*, 529 U.S. at 587, 120 S.Ct. 1655 (stating that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore*[ ], but only to the extent that those interpretations have the 'power to persuade[.]'").

35. We leave intact our observation in *Moore* that *Chevron* deference is inappropriate for informal agency interpretations, such as opinion letters and *amicus curiae* briefs. *See Moore*, 317 F.3d at 494. The most important reason for extending greater deference to an *amicus* brief that purports to interpret an agency's own ambiguous regulation (under *Auer*), than a brief that interprets the organic statute directly (under *Chevron*), is the greater expertise and familiarity of the agency with respect to the history and content of its own enacted rules. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L.REV. 612, 630-31 (1999). *But see id.* at 618 (concluding that, "by providing the agency an incentive to promulgate imprecise and vague rules, [*Auer*-type deference] undercuts important deliberative process objectives of the APA, and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules.").

EmCare's basic position is that it is possible to attribute a sufficiently clear scope to general language such as "practice ... medicine or any of [its] branches" to allow a court to decide whether a particular person falls within its ambit. Though courts often find broad language unambiguous,[36] this case presents mixed evidence of ordinary meaning, particularly in the conflict between the strict definition of medical practice used by the Medical Practices Acts and EmCare's more generous definition, derived from common usage. Whether, in the abstract, NP's and PA's "practice medicine" presents a close question of classification, akin to distinguishing among the Platonic Forms, but it is one that we need not reach. As explained in *Ehlert v. United States*, 402 U.S. 99, 105, 91 S.Ct. 1319, 28 L.Ed.2d 625 (1971),

> [w]e need not take sides in the somewhat theological debates ... that the phrasing of this regulation has forced upon so many federal courts. Rather, since the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such.

Because the language of § 541.3(e) is not "free from doubt," and in view of the fact that the Secretary's position finds support in past practice and is not "plainly erroneous

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36. *See, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (finding that the ordinary meaning of "modify" unambiguously precluded the FCC's interpretation under the Communications Act).

or inconsistent with the regulation," *Auer,* 519 U.S. at 461, 117 S.Ct. 905, deference is appropriate.

IV.

Congress has entrusted the DOL with the task of defining who is eligible for the professional exemption to the FLSA. The agency has determined that a necessary indicator of professional status in most cases is salaried compensation, with the limited exception of the traditional-i.e., well—established and easily identifiable-professions of law, medicine, and teaching. Absent a plain statement in a formal rule that NP's and PA's fall within this exception, the courts must choose between deciding the question *de novo* and deferring to the agency's less formal, but more specific, interpretive statements.

Auer counsels that deference better accords with Congress's intent and the agency's comparative expertise. Not only is the agency in a better position to determine when a salary is necessary to identify a professional: the agency is also better placed to make the calibrated policy judgment that PA's and NP's, despite higher barriers to entry and the increasing sophistication of their practice, are nascent professions in need of the FLSA's protection against the threat of "the evil of overwork as well as underpay."[37]

The summary judgment is **AFFIRMED**, and this matter is **REMANDED** for further proceedings.

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37. 81 CONG. REC. 4983 (1937) (message of President Roosevelt).

APPENDIX B — MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS DATED JANUARY 13, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CASE NO. 6:03-CV-73

JUNE BELT, on behalf of herself and on behalf of all others similarly situated,

Plaintiff

vs.

EMCARE INC., et al

Defendants

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs' Motion for Summary Judgment (Docket No. 131), Defendants' Cross Motion for Summary Judgment (Docket No. 166), and related briefing. Having considered the parties' written and oral arguments, the Court **GRANTS** Plaintiffs' motion and **DENIES** Defendants' cross motion.

Appendix B

BACKGROUND

Plaintiffs are nurse practitioners and physician assistants in several states who provide nursing services for EmCare, Inc. and Texas Em-1 Medical Services, P.A., (collectively "Defendants"). Defendants pay Plaintiffs on an hourly basis. Plaintiffs bring this collective action under the Fair Labor Standards Act ("FLSA") alleging that they regularly work more than forty hours per week and that Defendants have failed to pay them overtime compensation as required by the FLSA.

For the purpose of these summary judgments motions only, the parties have stipulated that Plaintiffs are employees, not independent contractors, of Defendants. The parties have agreed that the summary judgment issue is solely a legal one: whether nurse practitioners and physician assistants, who are paid on an hourly basis, qualify for the FLSA's professional exception to the overtime requirements.

STATUTE AND REGULATIONS

If an employee works more than forty hours in one work week, the FLSA requires an employer to pay the employee one and one-half times the employee's regular wage for each hour over forty the employee works. 29 U.S.C. § 207(a)(1). This overtime requirement does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity" as these terms are "defined and delimited" by the Labor Secretary through regulations. *Id.* § 213(a).

Appendix B

To satisfy the professional exception to the overtime requirement, persons employed in a professional capacity must satisfy certain work descriptions and be compensated on a salary or fee basis. 29 C.F.R. § 541.3 (1973). An exception is made to the salary-basis test for employees who hold "a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof ...." *Id.* § 541.3(e). Thus, the question here is whether physician assistants and nurse practitioners are exempted from the salary-basis test because they are engaged in "the practice of law or medicine or any of their branches."

STATUTORY AND REGULATORY INTERPRETATION

If Congress expressly delegates authority to an agency to interpret a specific statutory provision through regulations, a court must give controlling weight to the agency's interpretations unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). While an agency's interpretation of its own ambiguous regulation is not given *Chevron* deference, the agency's interpretation is controlling unless it is clearly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Wells Fargo Bank v. James*, 321 F.3d 488, 494 (5th Cir.2003); *see also Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). To determine whether *Auer* deference is appropriate, a court must first consider whether the regulation's language is ambiguous. *Wells Fargo*, 321 F.3d at 494. If "the regulation is ambiguous as to the precise issue

in contest, an agency's interpretation of its own regulation is controlling unless it is clearly erroneous." *Id.* (citing *Auer,* 519 U.S. at 452, 117 S.Ct. 905).

ANALYSIS

Congress delegated to the Labor Secretary the authority to define and delimit the terms in the FLSA's overtime requirement, and the Secretary has issued such regulations. 29 U.S.C. § 213(a); 29 C.F.R § 541 *et seq.*[1] These regulations do not expressly address whether physician assistants and nurse practitioners are exempted from the salary-basis test, and, on this issue, the regulation is therefore ambiguous. *See* 29 C.F.R. § 541.3. Because the Court is asked to interpret an ambiguous regulation rather than an ambiguous statute, *Auer* deference applies. *See Christensen,* 529 U.S. at 588, 120 S.Ct. 1655; *Wells Fargo,* 321 F.3d at 494. In other words, because the regulation is ambiguous to this issue, the Department of Labor's ("DOL") interpretation of the regulation will be controlling unless it is clearly erroneous. *See Auer,* 519 U.S. at 452, 461, 117 S.Ct. 905 ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"); *Wells Fargo,* 321 F.3d at 494. Accordingly, unless the DOL's interpretation is clearly erroneous, it is outside the Court's purview to impose its own meaning into the regulations.

1. The regulations have recently been amended, but the prior regulations govern this case. To avoid confusion, the Court will refer to the newer regulations as the "2004 Regulations" and the prior regulations as the "1973 Regulations," which is the date that the relevant portions of the regulations were issued.

Appendix B

DOL's Interpretations

In addition to creating the salary-basis test, the DOL also issued regulations interpreting the salary-basis test.[2] *See* 29 C.F.R. § 541.99-.602 (1973). The DOL has also issued an opinion letter that discusses the application of the salary-basis test to physician assistants.[3] A DOL handbook also interprets the salary-basis test as it applies to physician assistants. These interpretations will be controlling unless they are clearly erroneous.

The interpretive regulations explain that the exception to the salary-basis test "applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely service these professions." 29 C.F.R. § 541.304(a) (1973).

(b) In the case of medicine:

(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the

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2. Subpart A of the 1973 regulations (29 C.F.R. §§ 541.0-.52) define and delimit the substance of the overtime exception for those employed in an executive, administrative, or professional capacity. Subpart B of the 1973 regulations (29 C.F.R. §§ 541.99-.602) interprets the requirements set forth in Subpart A.

3. The Division within the DOL responsible for administering and enforcing the FLSA is the Wage and Hour Division, which has also been known as the Wage and Hour and Public Contracts Divisions. For simplicity, the Court will refer to this Division as the DOL.

> medical specialties practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors or science in optometry).
>
> . . . . .
>
> (c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

Id. § 541.304(b)-(c).

In 1974, the DOL issued an opinion letter concerning the status of physician assistants under the FLSA. Administrator's Op. WH-266 (Wage and Hour Division, Dep't of Labor May 10, 1974). The letter states that a physician assistant would meet the overtime-exemption criteria of section 541.3 if the physician assistant satisfies certain duty requirements and "is compensated for his or her services on a salary basis." *Id.* If these requirements are met, the physician assistant would come within the overtime requirement's professional exception. *Id.*

Appendix B

The DOL's 1994 Field Operations Handbook also addresses physician assistants under the FLSA. According to the handbook, a physician assistant qualifies for the professional exception if the physician assistant meets certain duty and academic requirements and is compensated on a salary basis. WAGE AND HOUR AND DIV., U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK 22d23 (1994).

Although the opinion letter and handbook are clear that physician assistants and nurse practitioners are subject to the salary-basis test, the interpretive regulation is unclear as to whether physician assistants and nurse practitioners are "other practitioners licensed and practicing in the field of medical science and healing" or are practitioners that "service the medical profession." Defendants contend that Plaintiffs are excepted from the salary-basis test because Plaintiffs are "other practitioners licensed and practicing in the field of medical science and healing." *See* 29 C.F.R. § 541.304(b)(1). Defendants argue that, based on Plaintiffs' job duties and state licensing requirements for their professions, Plaintiffs are more similar to podiatrists, dentists, and optometrists, all of whom are considered to be "other practitioners licensed and practicing in the field of medical science and healing." Plaintiffs assert that, as nurse practitioners and physician assistants, the exception does not apply to them because they are not engaged in the traditional practice of medicine but, rather, are in related professions that service the medical profession. *See id.* § 541.304(a). Therefore, the Court will examine the history of the salary-basis test and its interpretive regulations, as well as recent changes to the regulations, to determine the interpretive regulation's intended application as to these groups.

Appendix B

History

The salary-basis test for the professional exception to the overtime requirement was introduced in 1940 to prevent abuses to the expanding definition of "professional." 29 U.S.C. § 203(d) (1940); 5 Fed.Reg. 4077 (1940); WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, "EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL ... OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION 36 (1940) ("Stein Report")[4]. The salary-basis test was considered "the best single test of the employer's good faith in characterizing the employment as of a professional nature." Stein Report, at 42. At that time, an exception to the salary-basis test was made for any employee "who is the holder of a valid license or certificate permitting the practice of law or medicine, or any of their branches, and who is actually engaged in the practice thereof." 29 C.F.R. § 541.3(b) (Supp.1940); *see also* Stein Report, at 55. This exception to the salary-basis test was to apply "only in the case of the traditional professions of law and medicine, where possession of a State certificate or license is regarded as an adequate equivalent of a salary test." Stein Report, at 36. At that time, "[t]he three traditional professions of law, medicine, and theology occup[ied] a distinctive position in the United States," and members of those professions were considered "quasipublic officials." *Id.* at 42. This special status applied only to those "who have received a State license or certificate to practice law or medicine." *Id.*

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4. Harold Stein was the Presiding Officer.

Appendix B

The DOL revisited the FLSA's professional exception in 1949. The DOL considered extending the salary-basis test's exception to architects and engineers but rejected the idea.

> The practice of law and medicine has a long history of state licensing and certification; the licensing of engineers and architects is relatively recent. While it is impossible for a doctor or lawyer legally to practice his profession without a certificate or license, many architects and engineers perform work in these fields without possessing licenses, although failure to hold a license may limit their permissible activities to those of lesser responsibilities.

WAGE AND HOUR AND PUB. CONTRACTS DIVS., U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF THE REGULATIONS, PART 541: DEFINING THE TERMS "EXECUTIVE" "ADMINISTRATIVE" "PROFESSIONAL" "LOCAL RETAILING CAPACITY" "OUTSIDE SALESMAN" 77 (1949) ("Weiss Report"). Further, it was reasoned that most engineers and architects who hold state licenses and actually perform work permitted by the license will meet the salary requirement and be exempt from the overtime requirement. *Id.* at 78. Although the DOL sympathized with the goals of achieving recognition for these fields and placing them on par with medicine and law as professions, these objectives were "unrelated to the purposes of section 13(a)(1) of the Fair Labor Standards Act." *Id.* at 78.

> The report also discussed the meaning of "or any of their branches."
>
> Questions have been raised as to the meaning of the phrase "or any of their branches." It is therefore advisable to restate the Divisions' position that this exception applies only to the traditional professions of law and medicine and not to employees in related professions which merely service the professions of law or medicine. For example, in the case of medicine, the exception applies to physicians and other practitioners in the field of medical science and healing, such as dentists, or any of the medical specialties, but it does not include pharmacists, nurses, or other professions which service the medical profession.

Id. at 78. That same year, the DOL issued explanatory regulations without notice and comment using similar language.

> § 541.304 *Exception for physicians and lawyers.* A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law and medicine and not to employees in related professions which merely service the professions of law or medicine. For example, in the case of medicine, the

> exception applies to physicians and other practitioners in the field of medical science and healing, such as dentists, or any of the medical specialties, but it does not include pharmacists, nurses, or other professions which service the medical profession.

29 CFR § 541.304 (Supp.1950); 14 Fed.Reg. 7730, 7743 (1949).

In 1958, the DOL produced the Kantor Report after hearings on revising the salary-basis test. The Kantor Report reaffirmed the salary-basis test as a "practical guide to the investigator as well as to employers and employees in borderline cases, and simplif[ies] enforcement by providing a ready method of screening out the obviously nonexempt employees." WAGE AND HOUR AND PUB. CONTRACTS DIVS., U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541: DEFINING THE TERMS "EXECUTIVE" "ADMINISTRATIVE" "PROFESSIONAL" "LOCAL RETAILING CAPACITY" "OUTSIDE SALESMAN" 2-3 (1958) ("Kantor Report"). Reiterating the DOL's earlier position, the Kantor Report rejected the suggestion that licensed engineers and certified public accountants be excepted from the salary-basis test.

> The regulations contain such an exception for holders of licenses or certificates to practice law or medicine who are actually practicing their professions. This exception was based on the traditional standing of these professions, the recognition of doctors and lawyers as quasi-public

> officials, the universal requirement of licensing, and the relatively simple problems of classification in these professions.

Kantor Report, at 3-4.

The versions of the salary-basis test and interpretive regulations now before the Court were issued in 1973. *See* 29 C.F.R. §§ 541.3, 541.304 (1973); *see also* 32 Fed.Reg. 7823, 7829 (1967) (publishing the final rule when the relevant regulations were last substantively amended). This version followed the previous versions but expanded the salary-basis test's medical exception to include medical doctors, osteopathic physicians, podiatrists, dentists, and optometrists. 29 C.F.R. § 541.304(b)(1); 32 Fed.Reg. at 7829. The 1973 Regulations also expanded the list to whom the exception is inapplicable to include "pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession." 29 C.F.R. § 541.304(c); 32 Fed.Reg. at 7829. This version retained the idea that the exception only applies to "traditional professions of law, medicine, and teaching[5] and not to employees in related professions which merely serve these professions." 29 C.F.R. § 541.304(a); 32 Fed.Reg. at 7829.

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5. Teaching was added to the regulation in 1967 pursuant to the Fair Labor Standards Amendment of 1966 (P.L. 89-601).

Appendix B

Although the practice of medicine exception has slowly expanded to include osteopaths, podiatrists, dentists, optometrists, historically, the exception has always been limited to the "traditional" professions of medicine. Defendants argue that because physician assistants and nurse practitioners provide direct patient care and make professional judgments about patient care, they are included in the salary-basis exception as "other practitioners licensed and practicing in the field of medical science and healing." *See* 29 C.F.R. § 541.304 (1973). Defendants' arguments about the responsibilities and autonomy of physician assistants and nurse practitioners more appropriately addresses why these groups should be treated as "professionals." To be exempt from the overtime requirement as a "professional" an employee must perform work that requires advanced knowledge or "learning customarily acquired by a prolonged course of specialized intellectual instruction and study," "the consistent exercise of discretion and judgment in its performance," and is "predominately intellectual and varied in character ... and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." *Id.* § 541.3. These arguments do not address why physician assistants and nurse practitioners should be considered members of the "traditional professions of law [or] medicine." *See id* § 541.304(a).

It is undisputed that the physician assistant and nurse practitioner occupations did not develop until the 1960's. Thus, there is no way they could have been within the traditional practice of medicine when the exception was first enacted in 1940. Moreover, it is highly unlikely that the

professions could have been considered "traditional" professions of medicine when the relevant regulations were last substantively amended in 1967 or last issued in 1973. The "FLSA exemptions are to be 'narrowly construed against ... employers' and are to be withheld except as to persons 'plainly and unmistakably within their terms and spirit.' " *Auer*, 519 U.S. at 462-63, 117 S.Ct. 905 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960)). Given the history of the salary-basis test's exception, it is not plain or unmistakable that physician assistants and nurse practitioners are exempted from the salary-basis test under the interpretive regulations.

Comparison to Recent Changes

The relevant regulations were recently amended. *See* 69 Fed.Reg. 22122 (2004). Although the Court must decide this case under the earlier regulations, the changes shed light on the previous regulations. The 2004 Regulations eliminate the distinction between the "regulations" of Subpart A and the "interpretations" of Subpart B. 69 Fed.Reg. at 22126. Thus, all of the 2004 Regulations were issued after notice and comment and carry the force of law.

The 2004 Regulations continue to use a salary-basis test to determine whether employees qualify for the overtime exemption for executive, administrative, and professional employees. 29 C.F.R. § 541.600; 69 Fed.Reg. at 22269. The 2004 Regulations also continue to exempt teachers, lawyers, and medical practitioners from the salary requirement. 29 C.F.R. § 541.600(e); 69 Fed.Reg. at 22269.

> In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice of thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 C.F.R. § 541.600(e); 69 Fed.Reg. at 22269. Section 541.304(b) states:

> In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

29 C.F.R. § 541.304(b); 69 Fed.Reg. at 22267. Thus, although the structure of the regulation has changed, the substantive content has not. 69 Fed.Reg. at 22158 ("Section 541.304 Practice of Law or Medicine. The Department received few comments on this provision and does not believe any substantive changes to this section are necessary in light of those comments.").

Unlike the 1973 Regulations, the 2004 Regulations specifically address physician assistants. The 2004 Regulations state that physician assistants who meet certain educational and certification requirements "generally meet the duties requirements for the learned professional exemption." 29 C.F.R. § 541.301(e)(4); 69 Fed.Reg. at 22265-66. This statement is made in the section entitled "Learned Professionals," which recognizes certain occupations as learned professions. 29 C.F.R. § 541.301(e)(4). These "Learned Professionals" must be paid on a salary basis to qualify for the overtime exemption. *See id.* § 541.300(a)(1); 69 Fed.Reg. at 22265. Other occupations that are recognized in this section as learned professions, such as registered or certified medical technologists and nurses, are specifically excluded from the practice of medicine exception to the salary-basis test. 29 C.F.R. §§ 541.301(e), 541.600(e); 69 Fed.Reg. at 22265, 22269. Thus, it is reasonable to infer that, like registered or certified medical technicians and nurses, physician assistants are not "practitioners licensed and practicing in the field of medical science and healing" who are exempt from the salary-basis test.

A table listing the FLSA covered workers that are subject to the salary test in the final rule's preamble is also revealing. This table shows that no physicians, dentists, and

optometrists are subject to the salary-basis test. 69 Fed.Reg. at 22245. The table also shows that 53,420 hourly paid physician assistants and 34,053 salaried physician assistants are subject to the salary-basis test. *Id.*

It is clear to the Court that physician assistants are not excepted from the salary-basis test in the 2004 Regulations. Because there were no substantive changes in the 2004 Regulations from the 1973 Regulations, there is at least a logical inference that physician assistants were also not intended to be excepted from the salary-basis test in the interpretive 1973 Regulations.

Nurse Practitioners

Nurse practitioners are not specifically mentioned in the 2004 Regulations or the final rule's preamble. *See* 29 C.F.R. § 541 (2004); 69 Fed.Reg. at 22122. In both the 1973 Regulations and the 2004 Regulations, registered nurses are recognized as learned professions that do not qualify for the salary-basis test's exception. 29 C.F.R. §§ 541.301(e)(2), 541.600(e) (2004); 29 C.F.R. §§ 541.301(e)(1), 541.304(c) (1973). The table discussed above does not include nurse practitioners as a category that it considers. *See* 69 Fed.Reg. at 22244-48. Thus, the 2004 Regulations do not give any greater insight to the 1973 Regulations' meaning than the 1973 Regulations do themselves.

Although the recent changes to the regulation, the opinion letter, and the handbook do not specifically address nurse practitioners, the Court finds that nurse practitioners are not included in the exception to the salary-basis test as

formulated in the interpretive regulation. Defendants argue that, because physician assistants and nurse practitioners have standardized licensing requirements and perform direct patient care, they should be included in the exception to the salary requirement. As discussed above, despite their licensing requirement, the DOL has determined that physician assistants are not excepted from the salary-basis test. Accordingly, this argument is not persuasive as to nurse practitioners. As previously discussed, the history of the salary-basis test's exception does not support the inclusion of nurse practitioners. Therefore, the Court finds that the DOL's interpretive regulations do not include nurse practitioners in the exception to the salary-basis test.

The Labor Department's Interpretations Are Not Clearly Erroneous

The Court does not find that the DOL's interpretations of the ambiguous regulation, as expressed in the interpretive regulation, opinion letter, and handbook are clearly erroneous. The DOL's interpretation that physician assistants and nurse practitioners are subject to the salary-basis test is not inconsistent with the exception for employees who hold "a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof...." Historically, the exception to the salary-basis test has been limited to the "traditional" practice of medicine. The recent changes to the regulations, which state that they do not substantively change the exception, require physician assistants to be paid on a salary basis to be exempt from the overtime requirements. Given these considerations, the DOL's interpretations are not clearly erroneous.

Defendants argue that the opinion letter and handbook should not be given any weight because they do not represent a well-reasoned analysis of the salary-basis test's exception. Defendants argue the opinion letter is not well reasoned because one cannot discern from the opinion letter what materials were presented to the DOL, the opinion letter does not provide any reasoning or explanation for its conclusion, and it is out of date. Further, because the handbook is based on the earlier opinion letter, the handbook should be disregarded as well.[6] These arguments are not persuasive because an agency's interpretation of its own ambiguous regulation is entitled to deference unless it is clearly erroneous. *See Auer,* 519 U.S. at 452, 117 S.Ct. 905.

An agency's interpretation of its own ambiguous regulation expressed through opinion letters warrants a court's deference. *See Wells Fargo,* 321 F.3d at 494-95 (deferring to an opinion letter issued by the Office of the Comptroller of the Currency that interprets "customer" as used 12 C.F.R. § 7.4002(a)). Like the Court in *Auer,* this Court has "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer,* 519 U.S. at 462, 117 S.Ct. 905. The Court has no reason to believe that the DOL's interpretation is a post hoc rationalization to defend a past agency action against an attack. *See id.* It makes no sense to require the DOL to interpret its regulations in a specific manner because it is free

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6. Defendants also argue that physician assistants and nurse practitioners are included by the interpretive regulation's language in the exception to the salary-basis test. However, as discussed above, the Court disagrees with this position.

to write those regulations as it wishes, subject only to the limits imposed by the statute. *See id.* at 462-63, 117 S.Ct. 905. Thus, the DOL's interpretation of its own ambiguous regulation is given deference unless it is clearly erroneous or inconsistent with the regulation. *See Christensen,* 529 U.S. at 587, 120 S.Ct. 1655. This situation is unlike that in *Christensen,* in which the agency's position on the regulation's meaning was in direct conflict with the regulation's language. *See Christensen,* 529 U.S. at 588, 120 S.Ct. 1655 ("*Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous-it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Further, there is no reason to believe the DOL's interpretations are out of date. As the DOL is free to interpret its regulations as it likes, subject to the limitations imposed by the regulation's language, the DOL is also able to amend those interpretations to reflect changes that have occurred in the industry through the passage of time. Had the DOL believed that its opinion letter was outdated, it could have revisited the issue when it disseminated the policy through the handbook or anytime thereafter. Because the DOL did not do so, the Court must assume that these interpretations reflect the DOL's current interpretation.

Because the DOL's interpretations do not conflict with the regulation's language and are not otherwise inconsistent with the regulation, the Court finds that the DOL's interpretations are not clearly erroneous. Therefore, the Court defers to the DOL's interpretation. Accordingly, the Court

finds that physician assistants and nurse practitioners are not excepted from the salary-basis test. Thus, under the FLSA and its regulations, physician assistants and nurse practitioners, who are paid on an hourly basis, do not qualify for the FLSA's professional exception to the overtime requirements.

CONCLUSION

After reviewing the historical basis for the exception to the salary-basis test, the recent changes in the regulations, and the DOL's statements on the issue, the Court finds that the DOL interprets its regulation such that physician assistants and nurse practitioners are not exempt from the salary-basis test. The Court further finds that this interpretation is not clearly erroneous. The Court declines to rewrite these regulations as legislating is Congress's role as delegated to the DOL. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Cross Motion for Summary Judgment.

The Court recognizes that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation. Accordingly, the Court certifies this Order for interlocutory appeal under 28 U.S.C. § 1292(b).

Appendix B

So ORDERED and SIGNED this 13rd day of January, 2005

/s/
LEONARD DAVIS
UNITED STATES DISTRICT JUDGE